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1992–93 ANNUAL SURVEY OF LABOR AND EMPLOYMENT LAW

LABOR LAW

EMPLOYMENT DISCRIMINATION LAW

LABOR LAW

I. ORGANIZATIONAL AND REPRESENTATIONAL ACTIVITY

A. *Status of Paid Union-Organizers as "Employees" Under the National Labor Relations Act:* Sunland Construction Co.[1] *and* Town & Country Electric[2]

The National Labor Relations Act ("NLRA" or the "Act") protects employees from unfair labor practices including, but not limited to, hiring discrimination.[3] The scope of persons protected extends to all persons falling under the definition of "employee" in section 2(3).[4] Judicial interpretation of section 2(3) has expanded the term employee to encompass job applicants as well.[5] In order to gain access to employees and encourage unionization, unions have sent paid organizers to work as regular employees at non-union job sites.[6] Because management often opposes union organization, it has refused to hire union organizer applicants or has fired them upon learning about their organizing activities.[7] Thus, the courts and the National Labor Relations Board ("NLRB" or the "Board") have had to consider

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[1] 309 N.L.R.B. No. 180, 142 L.R.R.M. 1025 (1992).

[2] 309 N.L.R.B. No. 181, 142 L.R.R.M. 1036 (1992).

[3] 29 U.S.C. § 158(a)(3) (1973).

[4] 29 U.S.C. § 152(3) (1973). § 2(3) provides, in relevant part:

> The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer . . . and shall include any individual whose work has ceased as a consequence of . . . or because of any unfair labor practice . . . .

Id.

[5] *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 186, 8 L.R.R.M. 439, 442 (1941) (job applicants are employees under NLRA § 2(3)). In reaching its conclusion, the Court stated that Congress believed that labor disputes could "arise regardless of whether the disputants stand in the proximate relation of employer and employee . . . ." *Id.* at 192, 8 L.R.R.M. at 445 (quoting H.R. REP. No. 1147, 74th Cong., 1st Sess. 9 (1935) and also citing S. REP. No. 573, 74th Cong., 1st Sess. 6–7 (1935)).

[6] *See, e.g.*, Willmar Elec. Serv. v. NLRB, 968 F.2d 1327, 1328, 140 L.R.R.M. 2745, 2745–46 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1252, 142 L.R.R.M. 2584 (1993); H.B. Zachry Co. v. NLRB, 886 F.2d 70, 71, 132 L.R.R.M. 2377, 2377–78 (4th Cir. 1989); NLRB v. Henlopen Mfg. Co., 599 F.2d 26, 28, 101 L.R.R.M. 2247, 2248 (2d Cir. 1979); NLRB v. Elias Brothers Big Boy, 327 F.2d 421, 424, 55 L.R.R.M. 2402, 2404 (6th Cir. 1964); Dee Knitting Mills, 214 N.L.R.B. 1041, 1041, 88 L.R.R.M. 1273, 1274 (1974), *enforced*, 538 F.2d 312, 93 L.R.R.M. 2336 (2d Cir. 1975).

[7] *See, e.g.*, *Willmar*, 968 F.2d at 1328, 140 L.R.R.M. at 2746; *Zachry*, 886 F.2d at 71, 132 L.R.R.M. at 2377–78; *Henlopen*, 599 F.2d at 28–29, 101 L.R.R.M. at 2248–49.

whether paid union organizers qualify as employees under section 2(3) of the NLRA.[8]

The jurisdictions have split over whether a paid union organizer qualifies as a section 2(3) employee.[9] Two early cases exemplify this split, but neither adjudicator elaborated on the reasoning behind its conclusions.[10] In 1964, in *NLRB v. Elias Brothers Big Boy*, the United States Court of Appeals for the Sixth Circuit held that a waitress paid by her union to organize restaurant employees did not constitute a bona fide employee under section 2(3).[11] The waitress met with the union secretary prior to applying at Big Boy, received fifteen dollars from the union weekly, and worked as a full-time organizer after she left Big Boy.[12] From these facts, the court inferred that she worked for the union prior to applying at Big Boy and, thus, was not a bona fide employee within the intent of the Act.[13]

Conversely, in 1974, in *Dee Knitting Mills*, the NLRB held that a worker did not lose her employee status despite concurrently being paid by the union to organize.[14] A garment worker worked full-time for Dee Knitting Mills while simultaneously employed by the union to organize.[15] Nevertheless, the Board concluded that she was a bona fide full-time employee within the meaning of section 2(3).[16]

In 1975, in *Oak Apparel*, the NLRB held that paid union organizers who worked for an employer in order to organize the employer's work force qualified as employees under NLRA section 2(3).[17] The union sent two paid union organizers to work at Oak Apparel for the purpose

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[8] *See, e.g.*, *Willmar*, 968 F.2d at 1329, 140 L.R.R.M. at 2746; *Zachry*, 886 F.2d at 72, 132 L.R.R.M. at 2378; *Henlopen*, 599 F.2d at 30, 101 L.R.R.M. at 2250; *Big Boy*, 327 F.2d at 427, 55 L.R.R.M. at 2406–07; *Oak Apparel*, 218 N.L.R.B. 701, 701, 89 L.R.R.M. 1381, 1381–82 (1975); *Dee Knitting Mills*, 217 N.L.R.B. at 1041, 88 L.R.R.M. at 1274.

[9] *Compare* Escada (USA), Inc., 304 N.L.R.B. 845, 845, 139 L.R.R.M. 1131, 1131 (1991) (holding paid union organizers qualify as NLRA § 2(3) employees), *enforced*, 970 F.2d 898, 898, 140 L.R.R.M. 2872, 2872 (3d Cir. 1992) *and Willmar*, 968 F.2d at 1331, 140 L.R.R.M. at 2747 (D.C. Cir. holding same) *and Henlopen*, 599 F.2d at 30, 101 L.R.R.M. at 2250 (2d Cir. holding same) *and Oak Apparel*, 218 N.L.R.B. at 701, 89 L.R.R.M. at 1382 (NLRB holding same) *and Dee Knitting Mills*, 217 N.L.R.B. at 1041, 88 L.R.R.M. at 1274 (NLRB holding same) *with Zachry*, 886 F.2d at 72, 132 L.R.R.M. at 2378 (4th Cir. holding paid union organizers do not qualify as NLRA § 2(3) employees) *and Big Boy*, 327 F.2d at 427, 55 L.R.R.M. at 2407 (6th Cir. holding same).

[10] *See Big Boy*, 327 F.2d at 422–27, 55 L.R.R.M. at 2402–07; *Dee Knitting Mills*, 214 N.L.R.B. at 1041–42, 88 L.R.R.M. at 1274–75.

[11] 327 F.2d at 427, 55 L.R.R.M. at 2407.

[12] *Id.* at 423, 55 L.R.R.M. at 2403.

[13] *Id.* at 427, 55 L.R.R.M. at 2407.

[14] 214 N.L.R.B. at 1041, 88 L.R.R.M. at 1274.

[15] *Id.*

[16] *Id.* at 1041, 88 L.R.R.M. at 1274–75.

[17] 218 N.L.R.B. at 701, 89 L.R.R.M. at 1382.

of gauging Oak Apparel's employees' interest in unionization.[18] Both organizers were experienced sewing operators who performed ably and diligently.[19] Oak Apparel discharged both organizers after they allegedly disrupted work by trying to organize anti-union employees.[20]

In reaching its decision, the Board recognized the broad definition of "employee" in section 2(3) of the NLRA and case precedent holding that unlawful discrimination includes discrimination against applicants as well.[21] The Board reasoned that whether the organizers sought an employment relationship of a permanent nature was irrelevant because all job applicants fall within the scope and protection of the NLRA.[22] Thus, the Board ruled that paid union organizers constitute employees within the definition of the NLRA.[23]

In contrast, in 1989, in *H.B. Zachry Co. v. NLRB*, the United States Court of Appeals for the Fourth Circuit held that a paid union organizer was not a bona fide applicant for employment and, therefore, was not covered by the NLRA's definition of employee.[24] A full-time paid union organizer applied for employment with H.B. Zachry Company ("Zachry") so that he could organize the plant.[25] The *Zachry* court determined that paid union organizers do not fall within the plain meaning of employee.[26] The court interpreted the plain meaning of employee to include a person working under the direction of a single employer and not two different employers at the same time.[27] The court reasoned that the payment arrangements constituted evidence that the organizer would be on union business while working at Zachry and, therefore, worked under the union's supervision, not Zachry's.[28] Thus, the court decided that the paid union organizer did not constitute a section 2(3) employee.[29]

The court emphasized that including paid union organizers within the scope of "employee" would contravene the policies under-

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[18] *Id.* at 701, 89 L.R.R.M. at 1381.

[19] *Id.*

[20] *Id.*

[21] *Oak Apparel*, 218 N.L.R.B. at 701, 89 L.R.R.M. at 1381–82; *see, e.g.*, *Dee Knitting Mills*, 214 N.L.R.B. at 1041, 88 L.R.R.M. at 1274 (worker did not lose status as employee under NLRA because she was also paid by union to organize); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 186, 8 L.R.R.M. 439, 442 (1941) (union affiliated job applicants are employees under NLRA § 2(3)).

[22] *See Oak Apparel*, 218 N.L.R.B. at 701, 89 L.R.R.M. at 1381–82.

[23] *Id.* at 701, 89 L.R.R.M. at 1382.

[24] 886 F.2d 70, 72, 132 L.R.R.M. 2377, 2378 (4th Cir. 1989).

[25] *Id.* at 71, 132 L.R.R.M. at 2377–78.

[26] *Id.* at 73, 132 L.R.R.M. at 2379.

[27] *Id.*

[28] *See id.* at 73, 132 L.R.R.M. at 2379.

[29] *Zachry*, 886 F.2d at 72, 132 L.R.R.M. at 2378.

lying the NLRA.[30] The court reasoned that treating a paid union organizer as an employee would upset the NLRA policy of balancing the presupposed adversarial relationship between employers and unions.[31] Further, if a paid union organizer held the status of employee, he or she could impinge upon the Zachry employees' right to self-determination by being paid by the union to vote pro-union.[32] Thus, the court held that a paid union organizer did not qualify as a bona fide applicant for employment and, accordingly, did not constitute a section 2(3) employee.[33]

Between 1979 and 1992, three appellate court cases agreed with the NLRB's position that paid union organizers qualified as section 2(3) employees.[34] In 1979, in *NLRB v. Henlopen Mfg. Co.*, the United States Court of Appeals for the Second Circuit held that a paid union organizer constituted an employee.[35] An assembly line worker, employed part-time by Henlopen Manufacturing, concurrently received fifty dollars per week as a union organizer.[36] Without elaborating on its reasoning, the court concluded that the paid union organizer qualified as an employee.[37] Similarly, in 1992, in *Escada (USA), Inc. v. NLRB*, the United States Court of Appeals for the Third Circuit enforced an NLRB decision which held that a full-time paid union organizer was an employee entitled to the protections of the NLRA.[38]

Similarly, in 1992, in *Willmar Electric Serv. v. NLRB*, the United States Court of Appeals for the District of Columbia enforced an NLRB decision that an applicant who would have been simultaneously employed by the union and the company qualified as an employee.[39] The applicant testified that he probably would have stopped receiving pay from the union if hired, but would have retained the title of union field organizer and would have used his free time during lunch and after work to try to organize Willmar employees.[40] The *Willmar* court

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[30] *See id.* at 74–75, 132 L.R.R.M. at 2380.

[31] *Id.* at 74, 132 L.R.R.M. at 2380.

[32] *Id.* at 74–75, 132 L.R.R.M. at 2380.

[33] *Id.* at 72, 132 L.R.R.M. at 2378.

[34] *See* Escada (USA), 970 F.2d 898, 898, 140 L.R.R.M. 2872, 2872 (3d Cir. 1992), *enforcing*, 304 N.L.R.B. 845, 139 L.R.R.M. 1131 (1991); Willmar Elec. Serv. v. NLRB, 968 F.2d 1327, 1331, 140 L.R.R.M. 2745, 2745 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1252, 142 L.R.R.M. 2584 (1993); NLRB v. Henlopen Mfg. Co., 599 F.2d 26, 30, 101 L.R.R.M. 2247, 2250 (2d Cir. 1979).

[35] 599 F.2d at 30, 101 L.R.R.M. at 2250.

[36] *Id.* at 28, 101 L.R.R.M. at 2248.

[37] *See id.* at 30, 101 L.R.R.M. at 2250.

[38] 970 F.2d at 898, 140 L.R.R.M. at 2872. The court issued a brief one-sentence order without providing reasoning for its decision. *See id.*

[39] 968 F.2d at 1330–31, 140 L.R.R.M. at 2747.

[40] *Id.* at 1328, 140 L.R.R.M. at 2745–46.

reasoned that the applicant's dual loyalties to his employer and his union would not exclude him from qualification as a section 2(3) employee.[41] To support its reasoning, the court first cited the congressional assumption, manifested in related legislation, that an employee may be employed by both a union and another entity.[42] Second, the court noted the widespread nature of moonlighting.[43] Lastly, the court relied on the common law agency principle that a person can be the servant of two masters.[44] Thus, the court reasoned that the applicant's concurrent union employment would not disqualify him from the scope of section 2(3).[45]

The court factually distinguished *Zachry* by noting that, unlike the *Zachry* employee, the present applicant would not have remained employed and supervised by the union during the hours worked for Willmar.[46] The court also discounted the policy arguments that employee status would upset the balance between employer's rights and union rights,[47] or would impinge on employee self-determination rights.[48] Thus, the District of Columbia Circuit agreed with the NLRB by holding that an applicant retained section 2(3) employee status despite the fact that he would have worked for the union as an organizer and for the employer as a worker.[49] Thus, prior to the *Survey* year,

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[41] *See id.* at 1329–30, 140 L.R.R.M. at 2746–47.

[42] *Id.* at 1329, 140 L.R.R.M. at 2746. The court cited § 302 of the Labor Management Relations Act which generally prohibits payments from an employer to an employee of a union, except, "to any . . . employee of a labor organization, who is also an employee . . . of such employer, as compensation for . . . his service as an employee." *Id.* at 1329, 140 L.R.R.M. at 2746 (citing 29 U.S.C. § 186(c)(1) (1988)).

[43] *Willmar*, 968 F.2d at 1329, 140 L.R.R.M. at 2746.

[44] *Id.* at 1329–30, 140 L.R.R.M. at 2747. RESTATEMENT (SECOND) OF AGENCY § 226 (1958) states: "[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other." The *Willmar* court cited *Nationwide Mutual Ins. Co. v. Darden*, 112 S. Ct. 1344, 1348–49 (1992), in which the United States Supreme Court applied common law master-servant relationship principles to define the term "employee" in the Employee Retirement Income Security Act (ERISA). *Willmar*, 968 F.2d at 1329, 140 L.R.R.M. at 2746.

[45] *Willmar*, 968 F.2d at 1330, 140 L.R.R.M. at 2747.

[46] *Id.*; H.B. Zachry Co. v. NLRB, 886 F.2d 70, 73, 132 L.R.R.M. 2377, 2379 (4th Cir. 1989). The court stated that in most respects the organizer employee would have been indistinguishable from a zealous volunteer who resolved to use his free time during lunch and after work to advance the union's interests. *Willmar*, 968 F.2d at 1329, 140 L.R.R.M. at 2746.

[47] *See Willmar*, 968 F.2d at 1330, 140 L.R.R.M. at 2747. Although the court conceded that employment would provide the union organizer with a better position from which to propagandize, it reasoned this was also true for any union zealot who gained employment with Willmar. *Id.*

[48] *See id.* The qualification as an employee is not synonymous with eligibility to vote; an employee can only be included in a bargaining unit if he or she is found to share the necessary community of interest with other workers. *Id.*

[49] *Id.* at 1330–31, 140 L.R.R.M. at 2747.

federal jurisdictions were split over the status of paid union organizers under NLRA section 2(3).[50] The Second, Third and District of Columbia Circuits, as well as the NLRB, treated them as employees while the Fourth and Sixth Circuits did not.[51]

During the *Survey* year, in *Sunland Construction Co.* and *Town & Country Electric*, the Board held that paid union organizers qualified as employees under section 2(3) of the NLRA.[52] The Board heard arguments in both cases consecutively and issued identically reasoned, unanimous opinions.[53] Sunland Construction Co. ("Sunland") refused to hire qualified, union-affiliated applicants, including two paid union organizers, because of their union affiliation.[54] Town & Country Electric ("Town & Country") refused to hire union-affiliated applicants, and when it did hire one, it soon dismissed him because he was a union organizer.[55] In reaching its decision, the Board examined the ordinary meaning of the term employee, congressional intent, judicial interpretations of "employee," and the policies underpinning the NLRA.[56] While restating the NLRB rule that paid union organizers qualify as section 2(3) employees, the Board also carved out a significant exception: due to the "economic battle" between employer and union during a strike, an employer may protect its business interests by refusing to hire a paid union organizer, even though he or she is still a section 2(3) employee.[57] Thus, the Board continued its alignment with the Second, Third and District of Columbia Circuits by holding that paid union organizers constituted NLRA section 2(3) employees.[58]

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[50] See *supra* notes 9–49 and accompanying text for a discussion of these cases.

[51] *Id.*

[52] Sunland Constr. Co., 309 N.L.R.B. No. 180 at 7, 142 L.R.R.M. 1025, 1032 (1992); Town & Country Elec., 309 N.L.R.B. No. 181 at 8, 142 L.R.R.M. 1036, 1045 (1992).

[53] *See Sunland*, 309 N.L.R.B. No. 180 at 1–10, 142 L.R.R.M. at 1026–36; *Town & Country*, 309 N.L.R.B. No. 181 at 1–8, 142 L.R.R.M. at 1037–45.

[54] *Sunland*, 309 N.L.R.B. No. 180 at 1, 142 L.R.R.M. at 1027.

[55] *Town & Country*, 309 N.L.R.B. No. 181 at 1–3, 142 L.R.R.M. at 1038–39.

[56] *See Sunland*, 309 N.L.R.B. No. 180 at 2–8, 142 L.R.R.M. at 1027–33; *Town & Country*, 309 N.L.R.B. No. 181 at 3–8, 142 L.R.R.M. at 1040–45.

[57] *Sunland*, 309 N.L.R.B. No. 180 at 7–8, 142 L.R.R.M. at 1032–33. This exception was created in the *Sunland* opinion only.

[58] *See Sunland*, 309 N.L.R.B. No. 180 at 7, 142 L.R.R.M. at 1032; *Town & Country*, 309 N.L.R.B. No. 181 at 8, 142 L.R.R.M. at 1045. The court reaffirmed its adherence to *Oak Apparel* and its progeny, that being Escada (USA), 970 F.2d 898, 898, 140 L.R.R.M. 2872, 2872 (3d Cir. 1992), *enforcing*, 304 N.L.R.B. 845, 139 L.R.R.M. 1131 (1991), Willmar Elec. Serv. v. NLRB, 968 F.2d 1327, 1331, 140 L.R.R.M. 2745, 2747 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1252, 142 L.R.R.M. 2584 (1993), and NLRB v. Henlopen Mfg. Co., 599 F.2d 26, 30, 101 L.R.R.M. 2247, 2250 (2d Cir. 1979). *Sunland*, 309 N.L.R.B. No. 180 at 7, 142 L.R.R.M. at 1032; *Town & Country*, 309 N.L.R.B. No. 181 at 8, 142 L.R.R.M. at 1045.

In *Sunland*, the Boilermakers' Union submitted approximately 90 applications, including two from full-time paid union organizers, to Sunland for work on a boiler overhaul project.[59] Although Sunland did not hire any of the batched applicants, it subsequently hired welders and boilermakers for the project.[60] While striking the jobsite, one of the paid union organizers telephoned the jobsite foreman and learned that Sunland desperately needed welders.[61] When the paid union organizer identified himself and his union affiliation, the foreman said he would check with his supervisor and phone back.[62] When the foreman called back, he stated that no welders were being hired.[63] During the next five days, however, Sunland hired eight welders.[64]

In *Town & Country*, the employer engaged a temporary employment agency to recruit non-union, licensed electricians.[65] The Electricians' Union authorized members to work at non-union jobsites for organizational purposes and promised them reimbursement for wage, travel and health benefit differentials incurred in the process.[66] Responding to a newspaper advertisement placed by the agency, union-affiliated applicants arrived at a hotel for interviews and filled out application forms.[67] Despite Town & Country's need to fulfill a statutory requirement for licensed electricians on the jobsite, the employer refused to interview all but one of the union applicants.[68] Town & Country eventually hired the one union interviewee, but fired him two days into his work because he attempted to organize the employees at the jobsite.[69]

In both cases, the Board addressed the issue of whether paid union organizer applicants constitute employees under NLRA section

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[59] *Sunland*, 309 N.L.R.B. No. 180 at 1, 142 L.R.R.M. at 1027. Both union organizers were journeymen pipefitter/welders, and their qualifications for the job were not disputed. *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Sunland*, 309 N.L.R.B. No. 180 at 1, 142 L.R.R.M. at 1027.

[65] *Town & Country*, 309 N.L.R.B. No. 181 at 1–2, 142 L.R.R.M. at 1038. Because Town & Country Electric retained exclusive discretion to interview, hire, set wage rates, supervise and discharge employees obtained through the employment agency, the Board stated that the employment agency was an agent whose conduct in connection with hiring was binding on Town & Country Electric. *Id.*

[66] *Id.* at 2, 142 L.R.R.M. at 1038–39.

[67] *See id.* at 2, 142 L.R.R.M at 1038–39.

[68] *Id.* at 2–3, 142 L.R.R.M. at 1038–39. Based upon the facts, the Board concluded that Town & Country Electric had discriminatorily refused to consider these applicants for hire, notwithstanding its subsequent hire of one union applicant. *Id.* at 2–3, 142 L.R.R.M. at 1040.

[69] *Id.* at 3, 142 L.R.R.M. at 1039.

2(3).[70] Noting that applicants qualify as employees, the Board examined the definition of employee.[71] Relying on the broad language of section 2(3) and the ordinary usage of the term employee, the Board reasoned that, so long as union organizers working for or applying for work with an employer do so for wages in exchange for assigned work, they meet the standard dictionary definition of employee.[72] Examining the specific types of persons excluded from the section 2(3) employee definition, the Board concluded that paid union organizers were not listed and, therefore, were not statutorily excluded from its definition.[73] The Board determined that the legislative history of section 2(3) also supported this view because it reflected congressional intent to expansively interpret the term employee.[74]

Next, the Board considered the various judicial interpretations of section 2(3).[75] First, the Board noted that the United States Supreme Court has consistently interpreted section 2(3) expansively to include all individuals not explicitly excluded.[76] The Board analogized the Supreme Court's application of common law agency principles in

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[70] *See Sunland*, 309 N.L.R.B. No. 180 at 2, 142 L.R.R.M. at 1028; *Town & Country*, 309 N.L.R.B. No. 181 at 4, 142 L.R.R.M. at 1040.

[71] *Sunland*, 309 N.L.R.B. No. 180 at 2, 142 L.R.R.M. at 1028; *Town & Country*, 309 N.L.R.B. No. 181 at 4, 142 L.R.R.M. at 1040.

[72] *Sunland*, 309 N.L.R.B. No. 180 at 2–3, 142 L.R.R.M. at 1028; *Town & Country*, 309 N.L.R.B. No. 181 at 4, 142 L.R.R.M. at 1040.

[73] *Sunland*, 309 N.L.R.B. No. 180 at 3, 142 L.R.R.M. at 1028; *Town & Country*, 309 N.L.R.B. No. 181 at 4, 142 L.R.R.M. at 1040–41. NLRA § 2(3) provides in relevant part that the definition of employee excludes:

> . . . any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C.A. § 152(3) (1973).

[74] *Sunland*, 309 N.L.R.B. No. 180 at 3, 142 L.R.R.M. at 1028–29; *Town & Country*, 309 N.L.R.B. No. 181 at 4–5, 142 L.R.R.M. at 1041. When Congress added the exceptions to § 2(3) in 1947, it continued to refer to employees as individuals "working for another for hire" and "working for wages and salaries under direct supervision." *Sunland*, 309 N.L.R.B. No. 180 at 3, 142 L.R.R.M. at 1028; *Town & Country*, 309 N.L.R.B. No. 181 at 4, 142 L.R.R.M. at 1041 (citing H.R. REP. No. 245, 80th Cong., 1st Sess., 1 LEG. HIST. 309 (LMRA 1947)). In addition, Congress reassessed and rebalanced the right of an employer to require undivided loyalty from some workers by placing "supervisors" within § 2(3) exclusions. *Sunland*, 309 N.L.R.B. No. 180 at 3, 142 L.R.R.M. at 1028; *Town & Country*, 309 N.L.R.B. No. 181 at 4–5, 142 L.R.R.M. at 1041. The Board reasoned that had Congress concluded that paid union organizers were not entitled to NLRA protection, it knew how to and would have excluded them. *Sunland*, 309 N.L.R.B. No. 180 at 3, 142 L.R.R.M. at 1028; *Town & Country*, 309 N.L.R.B. No. 181 at 5, 142 L.R.R.M. at 1041.

[75] *Sunland*, 309 N.L.R.B. No. 180 at 3–5, 142 L.R.R.M. at 1029–30; *Town & Country*, 309 N.L.R.B. No. 181 at 5–6, 142 L.R.R.M. at 1041–42.

[76] *Sunland*, 309 N.L.R.B. No. 180 at 3–4, 142 L.R.R.M. at 1029; *Town & Country*, 309 N.L.R.B. No. 181 at 5, 142 L.R.R.M. at 1041; *see also supra* note 5.

interpreting the term "employee" under the Employee Retirement Income Security Act (ERISA) to the task at hand.[77] Finding no contrary congressional intent, the Board applied the agency principle that a servant can have two masters.[78] Consequently, the Board concluded that paid union organizers could not be excluded from the definition of employee simply because they are paid by both their union and the employer they attempt to organize.[79] Thus, the Board concluded that Supreme Court decisions supported an interpretation of section 2(3) that included paid union organizers in the definition of employee.[80]

Similarly, the Board examined the prior holdings of Courts of Appeals to support its position.[81] The Board cited the opinions of *Henlopen* (2d Cir.), *Escada* (3d Cir.) and *Willmar* (D.C. Cir.) for support, but noted that the opinions in *Zachry* (4th Cir.) and *Elias Brothers Big Boy* (6th Cir.) disagreed.[82] Bolstering its reasoning with the most recent Court of Appeals case, *Willmar*, the Board rejected the *Zachry* court's argument that a paid union organizer cannot be an employee because he or she receives wages from two entities.[83] The Board agreed with and followed the *Willmar* court's use of common law agency principles to conclude that concurrently paid union organizers are employees.[84] Thus, the Board distinguished *Zachry* and concluded that the Courts of Appeals' decisions supported the NLRB's reasoning in *Oak Apparel* and its progeny.[85]

The Board considered whether classifying paid union organizers as employees would advance the policies of the NLRA.[86] Given that the

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[77] *Sunland*, 309 N.L.R.B. No. 180 at 4, 142 L.R.R.M. at 1029; *Town & Country*, 309 N.L.R.B. No. 181 at 5, 142 L.R.R.M. at 1041–42; *see also* Nationwide Mutual Ins. Co. v. Darden, 112 S. Ct. 1344, 1348–9 (1992).

[78] *Sunland*, 309 N.L.R.B. No. 180 at 4, 142 L.R.R.M. at 1029; *Town & Country*, 309 N.L.R.B. No. 181 at 5, 142 L.R.R.M. at 1041–42.

[79] *Sunland*, 309 N.L.R.B. No. 180 at 4, 142 L.R.R.M. at 1029; *Town & Country*, 309 N.L.R.B. No. 181 at 5, 142 L.R.R.M. at 1042.

[80] *Sunland*, 309 N.L.R.B. No. 180 at 4, 142 L.R.R.M. at 1029; *Town & Country*, 309 N.L.R.B. No. 181 at 5, 142 L.R.R.M. at 1042.

[81] *Sunland*, 309 N.L.R.B. No. 180 at 5, 142 L.R.R.M. at 1030; *Town & Country*, 309 N.L.R.B. No. 181 at 6, 142 L.R.R.M. at 1042.

[82] *Sunland*, 309 N.L.R.B. No. 180 at 5, 142 L.R.R.M. at 1030; *Town & Country*, 309 N.L.R.B. No. 181 at 6, 142 L.R.R.M. at 1042.

[83] *See Sunland*, 309 N.L.R.B. No. 180 at 5, 142 L.R.R.M. at 1030; *Town & Country*, 309 N.L.R.B. No. 181 at 6–7, 142 L.R.R.M. at 1043; *see also* H.B. Zachry Co. v. NLRB, 886 F.2d 70, 72–74, 132 L.R.R.M. 2377, 2378–80 (4th Cir. 1989).

[84] *Sunland*, 309 N.L.R.B. No. 180 at 5, 142 L.R.R.M. at 1030–32; *Town & Country*, 309 N.L.R.B. No. 181 at 7, 142 L.R.R.M. at 1043.

[85] *Sunland*, 309 N.L.R.B. No. 180 at 5, 7, 142 L.R.R.M. at 1030, 1032; *Town & Country*, 309 N.L.R.B. No. 181 at 7, 8, 142 L.R.R.M. at 1043, 1045.

[86] *Sunland*, 309 N.L.R.B. No. 180 at 5, 142 L.R.R.M. at 1030; *Town & Country*, 309 N.L.R.B. No. 181 at 7, 142 L.R.R.M. at 1043.

right to organize is a central purpose of the Act, the Board determined that protecting paid union organizers as employees furthered this purpose by allowing employees to obtain information on their rights of self-organization while not impinging on the employer's legitimate managerial rights.[87] The Board perceived no conflict in a paid union organizer working for a non-union employer, because, during work time, the organizer is still subject to the employer's direction and control and must perform assigned work just like other employees.[88] Furthermore, the organizer's activities, like those of other employees, may be limited during work time by lawful non-solicitation rules.[89]

The Board dismissed Sunland's argument that an organizer-employee would impinge on other employees' self-determination rights because the organizer would be paid by the union to vote pro-union in an election.[90] The Board stated that an organizer's status as a statutory employee does not guarantee the right to vote, because organizers may be excluded from voting either as temporary employees or because their interests sufficiently differ from those of their coworkers.[91] Furthermore, the Board dismissed Sunland's argument that allowing paid union organizers to be section 2(3) employees would upset the balanced adversarial relationship which Congress carefully established between union and employer.[92] Although the Fourth Circuit accepted this same argument, the Board viewed it as misplaced, because the cases upon which it relied only dealt with the lawful restrictions employers may place on nonemployees, and did not intend to interpret section 2(3).[93]

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[87] *Sunland*, 309 N.L.R.B. No. 180 at 5–6, 142 L.R.R.M. at 1030–31; *Town & Country*, 309 N.L.R.B. No. 181 at 7, 142 L.R.R.M. at 1043.

[88] *Sunland*, 309 N.L.R.B. No. 180 at 6, 142 L.R.R.M. at 1031; *Town & Country*, 309 N.L.R.B. No. 181 at 7, 142 L.R.R.M. at 1043.

[89] *Sunland*, 309 N.L.R.B. No. 180 at 6, 142 L.R.R.M. at 1031; *Town & Country*, 309 N.L.R.B. No. 181 at 7, 142 L.R.R.M. at 1043.

[90] *Sunland*, 309 N.L.R.B. No. 180 at 6, 142 L.R.R.M. at 1031; *Town & Country*, 309 N.L.R.B. No. 181 at 7, 142 L.R.R.M. at 1043–44.

[91] *Sunland*, 309 N.L.R.B. No. 180 at 6, 142 L.R.R.M. at 1031; *Town & Country*, 309 N.L.R.B. No. 181 at 7, 142 L.R.R.M. at 1043–44.

[92] *See Sunland*, 309 N.L.R.B. No. 180 at 6, 142 L.R.R.M. at 1031; *Town & Country*, 309 N.L.R.B. No. 181 at 7–8, 142 L.R.R.M. at 1044.

[93] *Sunland*, 309 N.L.R.B. No. 180 at 6, 142 L.R.R.M. at 1031; *Town & Country*, 309 N.L.R.B. No. 181 at 8, 142 L.R.R.M. at 1044; *see also* Lechmere, Inc. v. NLRB, 112 S. Ct. 841, 846, 139 L.R.R.M. 2225, 2228, 2230 (1992) (so long as nonemployee union organizers have reasonable access to employees outside the employer's property, employer may bar nonemployees from its property); NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113–14, 38 L.R.R.M. 2001, 2004–05 (1956) (employer has a right to keep union organizers off employer's property where other reasonable avenues for communication do not exist); Note, *Access Rights of Nonemployee Union Organizers to an Employer's Property:* Lechmere, Inc. v. NLRB, 34 B.C. L. REV. 311 (1993). In

The Board disagreed with arguments that the union organizer would engage in union activities to the detriment of work assigned by the employer.[94] Based upon the statute's premise that an employee could be loyal to both employer and union, the Board reasoned that a paid union organizer's intentions to organize the employer's workforce did not imply that the organizer would be unwilling or unable to perform the assigned work.[95] According to the Board, engaging in conduct warranting legal discharge would be antithetical to the organizer's objective to work alongside other employees and organize them.[96] The Board cautioned, however, that its decision should not be interpreted to give paid union organizers "carte blanche" in the work place; if the organizer violates legitimate work rules or fails to perform adequately, the employer may subject the organizer to the same nondiscriminatory discipline as other employees.[97]

While the Board restated its position that a paid union organizer qualified as a section 2(3) employee, on the facts of *Sunland*, it created an exception: although a paid union organizer is an employee, the employer may refuse to hire an agent of the union during a strike.[98] Based on its experience, the Board indicated that when a company's employees are striking, an abnormal business situation exists whereby the union engages in an economic battle with the employer to try to shut down the business in order to force the employer to accede to

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footnotes, the *Survey* opinions stated that arguments were made that "paid union organizers are not employees because their request for employment is a guise to gain access to the employer's private property to further the union's objective." *Sunland*, 309 N.L.R.B. No. 180 at 6 n.35, 142 L.R.R.M. at 1031 n.35; *Town & Country*, 309 N.L.R.B. No. 181 at 8 n.34, 142 L.R.R.M. at 1044 n.34. The Board stated that "although gaining such access will likely facilitate the paid organizer's union activities, as long as the organizer is able, available, and fully intends to work for the employer if hired, he or she will not be disqualified from 'employee' status." *Sunland*, 309 N.L.R.B. No. 180 at 6 n.35, 142 L.R.R.M. at 1031 n.35; *Town & Country*, 309 N.L.R.B. No. 181 at 8 n.34, 142 L.R.R.M. at 1044 n.34. Further, the Board noted that "a paid union organizer employee arguably poses no greater threat to an employer's property rights than a pro-union employee who voluntarily engages in organizational activity." *Sunland*, 309 N.L.R.B. No. 180 at 6 n.35, 142 L.R.R.M. at 1031 n.35; *Town & Country*, 309 N.L.R.B. No. 181 at 8 n.34, 142 L.R.R.M. at 1044 n.34 (citing Note, H.B. Zachry Co. v. NLRB: *Paid Full-Time Union Organizer Not an "Employee"*, 50 LA. L. REV. 1211, 1215–16 (1990)).

[94] *Sunland*, 309 N.L.R.B. No. 180 at 6, 142 L.R.R.M. at 1031–32; *Town & Country*, 309 N.L.R.B. No. 181 at 8, 142 L.R.R.M. at 1044.

[95] *Sunland*, 309 N.L.R.B. No. 180 at 6–7, 142 L.R.R.M. at 1032; *Town & Country*, 309 N.L.R.B. No. 181 at 8, 142 L.R.R.M. at 1044.

[96] *Sunland*, 309 N.L.R.B. No. 180 at 6, 142 L.R.R.M. at 1032; *Town & Country*, 309 N.L.R.B. No. 181 at 8, 142 L.R.R.M. at 1044.

[97] *Sunland*, 309 N.L.R.B. No. 180 at 7, 142 L.R.R.M. at 1032; *Town & Country*, 309 N.L.R.B. No. 181 at 8, 142 L.R.R.M. at 1044.

[98] *See Sunland*, 309 N.L.R.B. No. 180 at 7, 142 L.R.R.M. at 1032–33.

union demands.[99] The Board noted that the employer has an equally legitimate interest in continuing business by hiring replacements.[100] The Board reasoned that, because the union is seeking to induce employees to withhold services from the employer, a conflict of interest arises and the employer has a substantial and legitimate business justification for declining to hire a paid agent of the union for the duration of the strike.[101]

Although the *Survey* cases were decided unanimously, two Board Members wrote concurring opinions.[102] Member Oviatt reconsidered his former, opposing position in light of the arguments presented and the *Willmar* decision.[103] Despite the non-union employer's disadvantage in having to hire a paid union organizer who may be viewed as a Trojan Horse entering the non-union jobsite, he reasoned that Congress intended to extend the protections of the NLRA to such individuals to facilitate the goals of organization and recognition of unions.[104]

In his concurring opinion, Member Raudabaugh argued that the Board's decision did not foreclose an employer from protecting itself against the union stratagem of sending paid union organizers to work at non-union jobsites.[105] He opined that a violation of the Act's section 8(a)(3) for discriminatory refusal to hire occurs only when the refusal was unlawfully motivated.[106] Thus, Member Raudabaugh believed that an employer with a nondiscriminatory policy or practice against hiring temporary employees may lawfully refuse to hire someone who only planned to work during an organizational drive and then leave.[107] Similarly, Member Raudabaugh argued that an employer with a nondiscriminatory policy or practice of refusing to hire persons who will be simultaneously employed by another employer, will have moonlight employment, or will be employed by institutions that are adversarial to

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[99] *Id.* at 7, 142 L.R.R.M. at 1032.

[100] *Id.*

[101] *Id.* at 7–8, 142 L.R.R.M. at 1032–33.

[102] *Sunland*, 309 N.L.R.B. No. 180 at 8–10, 142 L.R.R.M. at 1034–36; *Town & Country*, 309 N.L.R.B. No. 181 at 9, 142 L.R.R.M. at 1045.

[103] *Sunland*, 309 N.L.R.B. No. 180 at 8, 142 L.R.R.M. at 1034; *see, e.g.*, Escada (USA), Inc., 304 N.L.R.B. No. 109 at 1–2, 139 L.R.R.M. 1131, 1132–33 (1991), *enforced by* 970 F.2d at 898, 140 L.R.R.M. at 2872 (1992).

[104] *Sunland*, 309 N.L.R.B. No. 180 at 8–9, 142 L.R.R.M. at 1034–35.

[105] *Id.* at 9–10, 142 L.R.R.M. at 1035.

[106] *Id.* at 9, 142 L.R.R.M. at 1035. § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1973), provides in relevant part: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

[107] *Sunland*, 309 N.L.R.B. No. 180 at 9, 142 L.R.R.M. at 1035.

the employer could lawfully refuse to hire a paid union organizer.[108] Finally, Member Raudabaugh argued that, absent these loopholes, employers would be forced to hire qualified paid union organizers that they could otherwise legally exclude from company property.[109] Thus, in *Sunland* and *Town & Country*, the Board concluded that paid union organizers were employees within the definition of section 2(3) of the NLRA and that both employers discriminated in refusing to hire paid union organizers.[110]

The *Survey* cases represent a full airing and analysis of an issue that has divided and continues to divide the Circuit Courts. By concisely and methodically addressing the language, legislative history, disparate court interpretations, and policies of the NLRA, the Board clarified the rationale behind its prior declarations that paid union organizers are NLRA section 2(3) employees. Furthermore, the Board solidified its position on this issue because Board Member Oviatt, who had previously disagreed, joined the majority to form a unanimous position.[111] In addition, *Sunland* created an important exception to the rule: even though paid union organizers are employees, an employer can lawfully refuse to hire them during a strike.

Consistent with previous cases, NLRB decisions hinging on the issue of whether paid union organizers are section 2(3) employees will continue to be affirmed and enforced by the United States Court of Appeals for the Second, Third and District of Columbia Circuits. The response of the Fourth and Sixth Circuits, however, becomes a critical question. Both *Sunland* and *Town & Country* skillfully countered the Fourth Circuit's contrary arguments and, in addition, created an ex-

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[108] *Id.* at 10, 142 L.R.R.M. at 1035.

[109] *See id.* at 10, 142 L.R.R.M. at 1036; *see also* Lechmere, Inc. v. NLRB, 112 S. Ct. 841, 846, 139 L.R.R.M. 2225, 2228, 2230 (1992) (so long as nonemployee union organizers have reasonable access to employees outside the employer's property, employer may bar nonemployees from its property); NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113–14, 38 L.R.R.M. 2001, 2004–05 (1956) (employer has a right to keep union organizers off employer's property where other reasonable avenues for communication do not exist). Member Raudabaugh asserted that absent the aforementioned employer policies, the paid union organizer could circumvent these cases' holdings by entering the property as an applicant. *Sunland*, 309 N.L.R.B. No. 180 at 10, 142 L.R.R.M. at 1036.

[110] *Sunland*, 309 N.L.R.B. No. 180 at 7, 142 L.R.R.M. at 1032; *Town & Country*, 309 N.L.R.B. No. 181 at 8, 142 L.R.R.M. at 1045 (additionally, the Board found that Town & Country Electric had discriminated in its firing of the paid union organizer employee after only two days of work).

[111] *Sunland*, 309 N.L.R.B. No. 180 at 8, 142 L.R.R.M. at 1034; *Town & Country*, 309 N.L.R.B. No. 181 at 9, 142 L.R.R.M. at 1045. Consistent with the Board's position, it repeatedly has cited *Sunland* in subsequent decisions. *See* Sunland Construction Co., 311 N.L.R.B. No. 69 at 1 (1993) (holding paid union organizers are § 2(3) employees); Ultrasystems Western Constructors, 310 N.L.R.B. No. 83 at 1–2 (1993) (holding same); J & L Enterprises, 310 N.L.R.B. No. 23 at 1 (1993); Electro-Tec, 310 N.L.R.B. No. 16 at 1 (1993).

ception which represents an important "limited safety valve" for employers.[112]

In *Zachry*, the Fourth Circuit's primary arguments against granting paid union organizers employee status were: (1) that an employee can only have one employer; (2) that employees self-determination rights would be impinged upon by having a union employee pack the bargaining unit with a pro-union vote; and (3) that the employer's qualified property right to exclude union organizers would be defeated.[113] In the *Survey* cases, the Board skillfully defeated the first argument with Supreme Court precedent which utilized common law agency principles that a servant can have two masters.[114] The Board rendered the second argument moot because a person's status as an employee was not synonymous with the eligibility to vote for unionization.[115] The *Survey* cases' majority opinions dismissed the third argument, calling it misplaced, but in Member Raudabaugh's concurring opinion in *Sunland*, he advanced two potential employer practices that could satisfy the Fourth Circuit's concerns about the employer's property rights.[116] Member Raudabaugh's arguments, however, are merely dicta and the legality of these suggested practices has not been addressed by the Board.

Nevertheless, provided that the proposed employer practices are lawful, the Board's opinions in the *Survey* cases successfully counter all of the Fourth Circuit's arguments against a paid union organizer's employee status. In addition, *Sunland*'s strike time exception provides an important exemption during a critical time period. This exemption is appropriate and properly addresses the disparate interests and rights of employer and union at the peak of their conflict. While *Sunland* and *Town & Country* are not binding precedent on the Circuit Courts, the courts have traditionally given deference to administrative decisions in the area of labor law.[117] Therefore, the Board's thoughtful opinions and newly created exception to the rule should persuade the minority circuits to change their position.

In conclusion, in *Sunland* and *Town & Country*, the NLRB held that the NLRA protects paid union organizers because they qualify as

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[112] *Sunland*, 309 N.L.R.B. No. 180 at 8, 142 L.R.R.M. at 1033.

[113] *See* 886 F.2d 70, 72–75, 132 L.R.R.M. 2377, 2378–80 (4th Cir. 1989).

[114] *Sunland*, 309 N.L.R.B. No. 180 at 3–4, 142 L.R.R.M. at 1029; *Town & Country*, 309 N.L.R.B. No. 181 at 5, 142 L.R.R.M. at 1041–42.

[115] *Sunland*, 309 N.L.R.B. No. 180 at 6, 142 L.R.R.M. at 1031; *Town & Country*, 309 N.L.R.B. No. 181 at 7–8, 142 L.R.R.M. at 1043–44.

[116] *Sunland*, 309 N.L.R.B. No. 180 at 6, 9, 142 L.R.R.M. at 1031, 1035.

[117] ARCHIBALD COX ET. AL, CASES ON LABOR LAW 310–11 (11th ed. 1991).

employees under section 2(3) of the Act.[118] The Board reached this conclusion by reviewing the language of section 2(3), its legislative history, its judicial interpretations, and NLRA policies.[119] In *Sunland*, however, the Board carved out an exception to discrimination in hiring paid union organizers, holding that even though a paid union organizer is a section 2(3) employee, it is not unlawful to refuse to hire a paid union organizer during a strike.[120]

B. **Employee Participation Programs Under Sections 8(a)(2) and 2(5) of the National Labor Relations Act:* E.I. du Pont de Nemours & Co.[1]

Section 8(a)(2) of the National Labor Relations Act ("NLRA" or "Act") provides, in relevant part, that it is an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ."[2] Section 8(a)(2) was intended to abolish employer-dominated or "company" unions.[3] A labor organization, as defined in section 2(5) of the Act, is any employee group which exists for the purpose of "dealing with" employers concerning wages, hours or conditions of work.[4] Evaluation of a section 8(a)(2) charge, therefore, requires a two-tiered analysis.[5] In order for a union to prevail in a section 8(a)(2) charge it must be shown, both that the group is a labor

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[118] *Sunland*, 309 N.L.R.B. No. 180 at 7, 142 L.R.R.M. at 1032; *Town & Country*, 309 N.L.R.B. No. 181 at 8, 142 L.R.R.M. at 1045.

[119] *Sunland*, 309 N.L.R.B. No. 180 at 2–8, 142 L.R.R.M. at 1027–32; *Town & Country*, 309 N.L.R.B. No. 181 at 3–8, 142 L.R.R.M. at 1040–45.

[120] *Sunland*, 309 N.L.R.B. No. 180 at 7–8, 142 L.R.R.M. at 1032–33.

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[1] 311 N.L.R.B. No. 88, 143 L.R.R.M. 1121, *as corrected by* 143 L.R.R.M. 1268 (N.L.R.B. 1993).

[2] 29 U.S.C. § 158(a)(2) (1988).

[3] 78 Cong. Rec. 3443, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 15–16 (1949). Senator Robert Wagner viewed company unions as "[t]he greatest obstacles to collective bargaining . . . ." *Id.* at 15. Senator Wagner, the sponsor of the NLRA or Wagner Act, believed that to have meaningful collective bargaining, employees must be represented by people who are "not subservient to the employer with whom they deal . . . ." *Id.* at 16; ROBERT H. ZIEGER, AMERICAN WORKERS, AMERICAN UNIONS, 1920–1985, at 40 (1986). Thus, the term "labor organization" was given a broad definition in § 2(5) to reflect Senator Wagner's view. Electromation, Inc., 309 N.L.R.B. No. 163 at 3, 142 L.R.R.M. 1001, 1005 (1992), *petition for review pending sub nom.* Electromation, Inc. v. NLRB, No. 92-4129 et seq. (7th Cir.).

[4] 29 U.S.C. § 152(5) (1988). A labor organization is "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." *Id.*

[5] *See, e.g.*, NLRB v. Cabot Carbon Co., 360 U.S. 203, 209, 44 L.R.R.M. 2204, 2206 (1959); NLRB v. Scott & Fetzer Co., 691 F.2d 288, 291, 111 L.R.R.M. 2673, 2675 (6th Cir. 1982); *Electromation*, 309 N.L.R.B. No. 163 at 5, 142 L.R.R.M. at 1006.

organization under section 2(5) and that the labor organization is dominated or supported by the employer.[6] Although the United States Supreme Court provided guidance for determining when domination or interference has occurred under section 8(a)(2),[7] the evaluation of whether a group is a "labor organization," as defined in section 2(5), has presented difficulty.[8]

The United States Supreme Court, in the 1939 case *National Labor Relations Board v. Newport News Co.*, held that employee organizations that are dominated or interfered with by the employer violate the Act even if the employer has good motives or the interference is incidental rather than fundamental.[9] The Court interpreted section 8(a)(2) as providing for strict structural independence between employers and employee organizations.[10] The Court did not, however, elucidate the bounds of the definition of labor organizations provided in section 2(5).[11]

Two decades after *Newport News*, in 1959, the United States Supreme Court directly addressed the meaning of section 2(5) in *National Labor Relations Board v. Cabot Carbon Co.*[12] The Court held that Congress did not intend the term "dealing with," in section 2(5), to be synonymous with the more limited term "bargaining with," in the context of the collective bargaining process.[13] The Court relied upon the legislative history of the Act to support its interpretation.[14] The Court found that when the original version of the Wagner Act was debated in the Senate, the Secretary of Labor proposed that "bargaining collectively" be inserted instead of "dealing."[15] The proposal, however, was rejected.[16] The Court held that the rejection of this proposal

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[6] *See, e.g., Cabot Carbon*, 360 U.S. at 209, 44 L.R.R.M. at 220; *Scott & Fetzer*, 691 F.2d at 291, 111 L.R.R.M. at 2675; *Electromation*, 309 N.L.R.B. No. 163 at 5, 142 L.R.R.M. at 1006. *See also* 29 U.S.C. §§ 152(5), 158(a)(2).

[7] *See* NLRB v. Newport News Co., 308 U.S. 241, 251, 5 L.R.R.M. 665, 670 (1939).

[8] *See, e.g., Cabot Carbon*, 360 U.S. at 210, 44 L.R.R.M. at 2206; *Scott & Fetzer*, 691 F.2d at 291, 111 L.R.R.M. at 2675; General Foods Corp., 231 N.L.R.B. 1232, 1232, 1235, 96 L.R.R.M. 1204, 1204 (1977).

[9] 308 U.S. at 251, 5 L.R.R.M. at 669–70.

[10] *See id.* at 249–50, 5 L.R.R.M. at 669.

[11] *See id.* at 244, 5 L.R.R.M. at 667.

[12] 360 U.S. at 204–05, 44 L.R.R.M. at 2204. The employer established employee participation committees at each of its plants which were to examine problems of mutual interest to the employer and employees, including: safety, efficiency, production, conservation of capital and resources, encouragement of ingenuity and initiative, and non-union grievances. *Id.* at 205, 206 n.2, 44 L.R.R.M. at 2204, 2205 n.2.

[13] *Id.* at 211, 44 L.R.R.M. at 2207.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 211, 44 L.R.R.M. at 2207.

meant that Congress did not intend the two terms to be used interchangeably.[17]

The Court reasoned that the handling of non-union grievances by the employee committee was enough in itself to bring the committee within the definition of a labor organization under section 2(5).[18] The Court, however, observed that the committees also actively engaged in making proposals to the employer covering nearly the entire scope of the employment relationship and subjects which were commonly dealt with in collective bargaining.[19] The Court rejected the employer's contention that although the committees engaged in activities such as the handling of non-union grievances this handling did not constitute "dealing" within the meaning of section 2(5), because the committees only made recommendations; the final decision rested with the employer.[20] The Court reasoned that such characteristics were true of all dealing, whether an employer is dealing with an independent or employer-dominated employee organization.[21] Thus, after *Cabot Carbon*, any employee group that proposed terms or conditions of work and was assisted or supported by the employer, in any way, would violate section 8(a)(2).[22]

In 1977, the National Labor Relations Board ("Board") issued three decisions which limited the scope of *Cabot Carbon*.[23] In *General Foods Corp.*, the Board adopted an Administrative Law Judge's ("ALJ") finding that an employer created job enrichment program, which was comprised of the entire non-supervisory work crew, was not a labor organization as defined in section 2(5), but rather was an administrative subdivision.[24] The ALJ concluded that the work groups were a method of organizing the company's workforce, not labor organizations.[25] Thus, the Board, in *General Foods Corp.*, limited *Cabot Carbon* by creating an exception for employers which establish employee par-

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[17] *Cabot Carbon*, 360 U.S. at 211, 44 L.R.R.M. at 2207.

[18] *Id.* at 213, 44 L.R.R.M. at 2208.

[19] *Id.* at 213–14, 44 L.R.R.M. at 2208.

[20] *Id.* at 214, 44 L.R.R.M. at 2208.

[21] *Id.*

[22] *See Cabot Carbon*, 360 U.S. at 213–14, 44 L.R.R.M. at 2207–08.

[23] *General Foods*, 231 N.L.R.B. at 1234, 1235, 96 L.R.R.M. at 1204; Mercy-Memorial Hosp. Corp., 231 N.L.R.B. 1108, 1121, 96 L.R.R.M. 1239, 1240 (1977); Sparks Nugget, Inc., 230 N.L.R.B. 275, 276, 95 L.R.R.M. 1298, 1300–01 (1977), *enforced as modified sub nom.* NLRB v. Silver Spur Casino, 623 F.2d 571, 104 L.R.R.M. 3068 (9th Cir. 1980), *cert. denied*, Silver Spur Casino v. NLRB, 451 U.S. 906, 106 L.R.R.M. 3077 (1981).

[24] 231 N.L.R.B. 1232, 1234, 1235, 96 L.R.R.M. 1204, 1204 (1977).

[25] *Id.* The ALJ failed to cite any cases to support this conclusion. *Id.*

ticipation groups that are comprised of their entire employee complement instead of a representative group of employees.[26]

In *Mercy-Memorial Hospital Corp.*, the Board upheld an ALJ's decision that an employee committee which merely decided the validity of employee complaints and the appropriateness of disciplinary action was not "dealing with" management.[27] The ALJ reasoned that the committee was not "dealing with" the employer because the committee decided the outcome of the grievance without consulting with the employer.[28] The Board, therefore, limited *Cabot Carbon* by allowing employers to delegate some managerial authority to employees without violating section 8(a)(2).[29]

Finally, in *Sparks Nugget, Inc.*, the Board found that an employee committee was not a labor organization because it provided a purely adjudicatory function.[30] The committee had the power to render final and binding decisions on employee grievances.[31] The Board reasoned, therefore, that the committee did not "deal with" management because it performed a traditional management function delegated to it by management.[32] After *Sparks Nugget*, employers could avoid violating section 8(a)(2) of the Act when establishing employee participation programs, by delegating traditional management functions and the discretion to administer these functions to employee groups.[33]

In 1982, the United States Court of Appeals for the Sixth Circuit also limited the breadth of *Cabot Carbon*'s interpretation of the Act, in *NLRB v. Scott & Fetzer Co.*[34] The Court denied enforcement of the Board's finding that an employer had violated section 8(a)(2) by establishing a committee to promote in-plant communications between the employees and the company.[35] The expressed goal of the

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[26] *Id.*

[27] 231 N.L.R.B. at 1121, 96 L.R.R.M. at 1240.

[28] *See id.*

[29] *See id.*

[30] 230 N.L.R.B. at 276, 95 L.R.R.M. at 1300–01.

[31] *Id.*

[32] *Id.* at 276, 95 L.R.R.M. at 1300. Chairperson Fanning dissented, in part, because the committee was composed of one employee representative and two management representatives. *Id.* at 277, 95 L.R.R.M. at 1301 (Fanning, dissenting in part). Chairperson Fanning concluded that the committee was controlled by management and thereby supplanted the grievance procedure contained in the collective bargaining agreement. *Id.* (Fanning, dissenting in part).

[33] *See id.* 230 N.L.R.B. at 276, 95 L.R.R.M. at 1301.

[34] 691 F.2d 288, 289, 111 L.R.R.M. 2673, 2674 (6th Cir. 1982).

[35] *Id.* The court rejected an overly broad interpretation of the Act, quoting Circuit Court Judge John Minor Wisdom's dissent in *NLRB v. Walton Mfg. Co. Id.* at 292–93, 111 L.R.R.M. at 2677 (quoting *Walton Mfg.*, 289 F.2d 177, 182, 47 L.R.R.M. 2794, 2797 (5th Cir. 1961) (Wisdom, J., dissenting)). Judge Wisdom concluded that such an interpretation "erects an iron curtain

committee was to provide a process for communicating company plans and programs, as well as to define and identify problem areas and elicit suggestions for improving operations.[36] The court reasoned that enforcement of the Board's decision would be detrimental to the employer's good-faith attempt to communicate with its employees.[37]

The Sixth Circuit followed the *Scott & Fetzer* decision, in 1989, in *Airstream, Inc. v. NLRB*.[38] The court denied enforcement of a Board order which found that an employee participation committee was an employer-dominated labor organization in violation of section 8(a)(2).[39] The court reasoned that the committee did not violate section 8(a)(2) because it did not "deal with" the employer concerning the subjects outlined in section 2(5), rather it merely functioned as a communication channel.[40]

In 1992, the Board, in *Electromation, Inc.*, addressed the legality of several employer-created committees under section 8(a)(2) of the Act.[41] The Board held that an employer violated section 8(a)(2) by creating five Action Committees which were to propose solutions to certain company problems.[42] The Board reasoned that the committees were labor organizations under section 2(5) of the Act because the committees made proposals to the company's management and management adopted the proposals if they believed the committees' proposals were generally within the budget and acceptable to the employees as a whole.[43] Furthermore, the Board observed that the committees

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between employer and employees, penetrable only by the bargaining agent of a certified union, if there is one, preventing the development of a decent, honest, constructive relationship between management and labor." *Id.* (Wisdom, J., dissenting).

[36] 691 F.2d at 292–93, 111 L.R.R.M. at 2677.

[37] *See Scott & Fetzer*, 691 F.2d at 295, 111 L.R.R.M. at 2679. The court noted, as additional support for its holding, that the employer did not show any hostility or anti-union animus, and neither the employees, the committee nor the union considered the committee a labor organization. *Id.*

[38] Airstream, Inc. v. NLRB, 877 F.2d 1291, 1297, 131 L.R.R.M. 2899, 2904 (6th Cir. 1989).

[39] *Id.* at 1300, 131 L.R.R.M at 2906.

[40] *Id.* at 1295–96, 131 L.R.R.M. at 2903.

[41] 309 N.L.R.B. No. 163 at 1–2, 142 L.R.R.M. 1001, 1002–03.

[42] *Id.* at 1, 2, 142 L.R.R.M. at 1002, 1003. The five committees were (1) Absenteeism/Infractions, (2) No Smoking Policy, (3) Communication Network, (4) Pay Progression for Premium Positions and (5) Attendance Bonus Program. *Id.* at 2, 142 L.R.R.M. at 1003.

[43] *Id.* at 7–8, 142 L.R.R.M. at 1008–09. In its analysis, the Board looked to the legislative history of the Act and to *Cabot Carbon* for guidance. *Id.* at 3–6, 142 L.R.R.M. at 1004–07. It stressed that the legislative history showed that Congress sought to eliminate "company unions" through §§ 8(a)(2) and 2(5). *Electromation*, 309 N.L.R.B. No. 163 at 3, 142 L.R.R.M. at 1004. In addition, the Board noted that *Cabot Carbon* provided that "dealing with" is broader than the term "collectively bargain with" and applies to situations that do not contemplate the negotiation of a collective bargaining agreement. *Id.* at 5, 142 L.R.R.M. at 1006 (citing *Cabot Carbon*, 360 U.S. at 211, 44 L.R.R.M. at 2207).

were dominated by the employer because they were created and supported by the employer.[44] The Board concluded, therefore, that the committees were employer-dominated labor organizations in violation of section 8(a)(2).[45]

In addition, the Board clarified its interpretation of the section 2(5) phrase "dealing with" in footnote twenty-one.[46] The Board stated:

> [W]e view "dealing with" as a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in section 2(5), coupled with real or apparent consideration of those proposals by management. A unilateral mechanism, such as a "suggestion box," or "brainstorming" groups or meetings, or analogous information exchanges, does not constitute "dealing with."[47]

Member Devaney filed a concurring opinion critical of the breadth of the majority's interpretation of "labor organization" under section 2(5).[48] He stressed that section 8(a)(2) should not create obstacles to the implementation of employee participation plans so long as those programs do not impair the employees' right to freely choose a bargaining representative.[49] To support his conclusion, Member Devaney observed that: a pure employee participation plan was not before Congress in 1935 and had never been before the Supreme Court; the legislative history of the Act did not show concern over employer initiated plans dealing with managerial issues such as efficiency, quality or productivity; and finally, Board precedent demonstrated that such plans may be legal under a number of circumstances.[50] Thus, after *Electromation*, employers were free to establish

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The Board further concluded that the employer dominated the committees. *Electromation*, 309 N.L.R.B. No. 163 at 7, 142 L.R.R.M. at 1008. The employer established, oversaw and participated in each committee. *Id.* at 2, 142 L.R.R.M. at 1003. Each committee consisted of six employees, one or two members of management and the Employee Benefits Manager. *Id.* at 2, 142 L.R.R.M. at 1003. The employer determined the goals of each committee and the number of employees who could join. *Id.* Employees were compensated for time spent participating, and necessary materials were provided by the employer. *Id.* As evidence of the employer's control of the committees, the Board noted that two employees who had signed-up for more than one committee were informed by the employer that each would be limited to participation on one committee. *Id.* at 2, 8, 142 L.R.R.M. at 1003, 1009.

[44] *Electromation*, 309 N.L.R.B. No. 163 at 8, 142 L.R.R.M. at 1010.

[45] *Id.* at 7, 142 L.R.R.M. at 1008.

[46] *Id.* at 5 n.21, 142 L.R.R.M. at 1006 n.21.

[47] *Id.*

[48] *Id.* at 9, 11, 142 L.R.R.M. at 1010, 1012.

[49] *Electromation*, 309 N.L.R.B. No. 163 at 10, 142 L.R.R.M. at 1010.

[50] *Id.* at 9–10, 142 L.R.R.M. at 1010. Members Oviatt and Raudabaugh also filed concur-

unilateral mechanisms for employees to convey information to the employer in non-union shops.[51] In addition, as established in previous cases, employers could establish organizations which were limited to the performance of managerial or adjudicative functions.[52]

During the *Survey* year, in *E.I. du Pont de Nemours & Co.*, the Board held that an employer violated section 8(a)(2) by establishing and dealing with six safety committees and one fitness committee composed of union member employees and members of company management.[53] The Board found that the committees were labor organizations under the Act.[54] The Board also concluded that the employer dominated the committees, in violation of section 8(a)(2).[55] In addition, the Board held that the employer did not violate the Act by conducting safety conferences at which employees discussed and submitted suggestions and ideas concerning plant safety.[56] Finally, the Board outlined several types of employee participation activities which it would deem lawful.[57]

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rences. *Electromation*, 309 N.L.R.B. No. 163 at 14, 142 L.R.R.M. at 1014 (Oviatt, concurring); *Electromation*, 309 N.L.R.B. No. 163 at 15, 142 L.R.R.M. at 1016 (Raudabaugh, concurring). Member Oviatt stressed the need for employee participation in the American workplace to compete in the world market. *Electromation*, 309 N.L.R.B. No. 163 at 14, 142 L.R.R.M. at 1015 (Oviatt, concurring). He outlined several employee participation programs which are designed to enhance productivity and efficiency by increasing communication between employers and employees as well as increasing employee morale and self-fulfillment. *Id.* at 14–15, 142 L.R.R.M. at 1015 (Oviatt, concurring). Member Oviatt concluded that discussions pertaining to efficiency and productivity are not violative of the Act because they are not concerned with grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. *Id.* at 15, 142 L.R.R.M. at 1015 (Oviatt, concurring).

Member Raudabaugh also filed a concurring opinion in which he argued for the reinterpretation of § 8(a)(2). *Electromation*, 309 N.L.R.B. No. 163 at 15, 23, 142 L.R.R.M. at 1016, 1023 (Raudabaugh, concurring). He proposed four factors which may be used to determine the legality of employee participation programs: (1) the extent of the employer's involvement in the structure and operation of the committee, (2) the reasonableness of the employees' perception of the committee as a substitute for collective bargaining, (3) whether the employees have been assured of their § 7 rights and (4) the employer's motives in establishing the committee. *Id.* at 23, 142 L.R.R.M. at 1023 (Raudabaugh, concurring).

[51] 309 N.L.R.B. at 5 n.21, 142 L.R.R.M. at 1006 n.21.

[52] *Id.* at 6, 142 L.R.R.M. at 1007 (citing *General Foods*, 231 N.L.R.B. 1232, 96 L.R.R.M. 1204; *Mercy-Memorial*, 231 N.L.R.B. 1108, 96 L.R.R.M. 1239; *Sparks Nugget*, 230 N.L.R.B. 275, 95 L.R.R.M. 1298).

[53] 311 N.L.R.B. No. 88 at 1, 143 L.R.R.M. 1121, 1122–23, *as corrected by* 143 L.R.R.M. 1268 (N.L.R.B. 1993). The Board also held that the employer violated § 8(a)(5) when it dealt with the committees instead of the certified union. *Id.* at 5, 143 L.R.R.M. at 1126.

[54] *Id.* at 1, 143 L.R.R.M. at 1122–23.

[55] *Id.*

[56] *Id.* at 4–5, 143 L.R.R.M. at 1125–26.

[57] *E.I. du Pont*, 311 N.L.R.B. No. 88 at 2–3, 143 L.R.R.M. at 1124.

The employer in *E.I. du Pont* established six safety committees and one fitness committee at its Chambers Works Chemical plant in Deepwater, New Jersey.[58] The employer initiated the establishment of the committees and decided which particular employees would be invited to join.[59] Members of management served on all seven committees, employee members were compensated at their regular rate for committee work and the committees operated at the will of the company, which could modify or abolish them at any time.[60]

The employer, in effect, had a veto power over any proposal.[61] Some of the committees submitted proposals to management representatives outside the committees and all of the committees discussed proposals with management representatives who were members of the committees.[62] Each committee was required by company rules to reach a consensus on all of its proposals.[63] Management members, therefore, had the power to block any proposal since all of the members of the committee were required to agree.[64] In addition, the management members acted as the head of the committees and set the agenda for meetings.[65]

The employer also held day-long safety conferences each quarter,[66] which were organized and led by management.[67] Each safety conference began with company managers making opening statements followed by the conferees dividing into small groups to discuss specific safety topics.[68] While in the groups, employees shared their experiences with plant safety, safety problems they had encountered, how to overcome these problems and how to implement solutions.[69] The comments of the conferees were recorded and forwarded to one of the employee participation committees for consideration.[70]

The Union filed unfair labor practice charges against the employer, claiming that the several employee committees were labor organizations which were dominated by the employer.[71] At the adminis-

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[58] E.I. du Pont de Nemours & Co., 4-CA-18737-1 *et seq.*

[59] *Id.* at 13.

[60] *Id.*

[61] *E.I. du Pont*, 311 N.L.R.B. No. 88 at 3, 143 L.R.R.M. at 1124.

[62] *Id.* at 2–3, 143 L.R.R.M. at 1123–24.

[63] *Id.* at 3, 143 L.R.R.M. at 1124.

[64] *Id.*

[65] *Id.* at 3–4, 143 L.R.R.M. at 1125.

[66] *E.I. du Pont*, 311 N.L.R.B. No. 88 at 4, 143 L.R.R.M. at 1125.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *E.I. du Pont*, 4-CA-18737-1 *et seq*, at 1.

trative hearing level, the ALJ ruled that the committees were labor organizations dominated by the employer in violation of section 8(a)(2).[72] The General Counsel appealed the ALJ's ruling to the Board.[73]

The Board agreed with the ALJ's ruling, but added rationale to the decision in order to provide guidance to employers in unionized settings that wish to implement lawful cooperation programs between employees and management.[74] The Board concluded that the committees were labor organizations as defined in section 2(5).[75] The Board stated that as a threshold question in section 8(a)(2) cases, it must be determined whether (1) employees participated, (2) the organization existed at least in part for the purpose of dealing with the employer and (3) these dealings concerned the subjects enumerated in section 2(5).[76] The Board concluded that the committees were organizations in which employees participated and that the subject matter of their discussions fell within the categories of subjects listed in section 2(5).[77] Thus, the committees met the first and third requirements.[78]

With regard to the second requirement, the Board relied on language in footnote twenty-one of *Electromation*.[79] The Board stated that if there was a *pattern* or *practice* in which a group of employees made proposals to management over time and management responded to these proposals by word or deed, where compromise was not necessary, the employee group was "dealing with" the employer for purposes of the Act.[80] The Board stated, however, that if the proposals were only *isolated* instances of *ad hoc* proposals followed by a management response, then the element of dealing would be missing.[81]

In addition, the Board delineated four types of "safe havens" in which employee groups would not be considered labor organizations because their actions would be communicative rather than proposing change.[82] First, the Board noted that if the purpose of the group was to develop a host of ideas from which the employer might glean some

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[72] *E.I. du Pont*, 311 N.L.R.B. No. 88 at 1, 143 L.R.R.M. at 1122.

[73] *Id.* at 1 n.1, 143 L.R.R.M. at 1122 n.1.

[74] *Id.* at 1, 143 L.R.R.M. at 1123.

[75] *Id.* at 2, 3, 143 L.R.R.M. at 1123–24.

[76] *E.I. du Pont*, 311 N.L.R.B. No. 88 at 2, 143 L.R.R.M. at 1123.

[77] *Id.* The committees discussed subjects such as safety, incentive awards for safety and benefits such as employee jogging tracks and picnic areas. *Id.*

[78] *Id.*

[79] *Id.* at 2, 143 L.R.R.M. at 1123.

[80] *E.I. du Pont*, 311 N.L.R.B. No. 88 at 2, 143 L.R.R.M. at 1123.

[81] *Id.* at 2, 143 L.R.R.M. at 1123–24.

[82] *See id.* at 2, 3, 143 L.R.R.M. at 1124.

ideas, then the "brainstorming" session would not be dealing.[83] Second, if the employer gathered information from the employee committee and did what it wished with the information, then dealing had not taken place.[84] Third, the Board concluded that a "suggestion box" format did not constitute an organization, committee, or plan under section 2(5) because the employees would be submitting suggestions as individuals.[85] Finally, if the committee existed for the sole purpose of planning educational programs then there would not be "dealing."[86] Thus, the Board concluded that these enumerated activities would not be dealing because they constituted transmission of information, not proposals for change.[87]

The Board distinguished the employee groups at issue from ones that only conduct brainstorming, information gathering or educational programs.[88] The Board noted that all the committees involved group action and not individual communication; the groups made proposals to management representatives in different ways and the employer responded by word or deed.[89] The Board also stated that the activity between the employer and the groups was "virtually identical" to the dealing in *Cabot Carbon*.[90] The Board concluded, therefore, that the employee participation committees in both cases were the same because the groups made proposals and management, with the absolute power to reject any proposal, responded.[91] Thus, the Board held that the committees at issue did not fall within any of the "safe havens" outlined by the Board.[92]

The Board found, however, that the activities at the safety conferences were not violative of the Act.[93] The Board used the safety conferences to illustrate permissible conduct which would not constitute "dealing with" under the Act.[94] The Board found the conferences were merely "brainstorming" sessions.[95] It reasoned that the conferees were not charged with making proposals to improve safety; rather, they were to submit suggestions and ideas.[96] The Board concluded that the con-

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[83] *Id.* at 2, 143 L.R.R.M. at 1123–24.
[84] *Id.*
[85] *E.I. du Pont*, 311 N.L.R.B. No. 88 at 2, 143 L.R.R.M. at 1124.
[86] *Id.* at 3, 143 L.R.R.M. at 1124.
[87] *See id.* at 2, 3, 143 L.R.R.M. at 1124.
[88] *Id.* at 2–3, 143 L.R.R.M. at 1124.
[89] *Id.* at 2, 143 L.R.R.M. at 1124.
[90] *E.I. du Pont*, 311 N.L.R.B. No. 88 at 3, 143 L.R.R.M. at 1124.
[91] *Id.* at 2–3, 143 L.R.R.M. at 1124.
[92] *Id.* at 3, 143 L.R.R.M. at 1124.
[93] *Id.* at 4–5, 143 L.R.R.M. at 1125–26.
[94] *Id.* at 4–5, 143 L.R.R.M. at 1126.
[95] *E.I. du Pont*, 311 N.L.R.B. No. 88 at 4, 143 L.R.R.M. at 1125.
[96] *Id.* at 5, 143 L.R.R.M. at 1126.

ferences were a unilateral mechanism designed to elicit information from the employees and not a bilateral mechanism intended to collect specific proposals from the conferees.[97]

The Board declined to adopt a rule that employee participation committees with management members were *per se* dealing with management.[98] The Board reasoned that there was a distinction between a management member who could reject any committee proposal and a management member of an autonomous committee with a majority of employees.[99] Similarly, the Board noted that management participation on a committee as an observer or facilitator, without a vote, would not constitute dealing.[100]

In a concurring opinion, Member Devaney stressed that, although he agreed with the result of the majority's decision, his narrower view of section 8(a)(2) provided employers with greater opportunities to engage employees in participation programs without violating the Act.[101] Member Devaney reiterated his interpretation of the Act which he first put forth in his concurrence in *Electromation*.[102] He concluded that the legislative and precedential history of section 8(a)(2) leaves employers with significant freedom to engage employees in communication and participation programs.[103]

Member Devaney stated that if the participation program impaired the employees' free choice of a bargaining representative then section 8(a)(2) had been violated.[104] According to the concurring opinion, the committees violated section 8(a)(2) because the employer undermined the freely chosen bargaining agent by establishing, tacitly recognizing, and bargaining over mandatory subjects with the employer-controlled employee representation committees.[105] Thus, Devaney concluded that employee participation committees are legal if they unambiguously act as agents of the employer and do not pretend to represent the employees as distinct from the employer.[106]

The ruling in *E.I. du Pont* is proper in light of the Supreme Court's broad interpretation of section 8(a)(2) in *Cabot Carbon* and

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[97] *Id.*

[98] *Id.* at 3, 143 L.R.R.M. at 1124.

[99] *Id.*

[100] *E.I. du Pont*, 311 N.L.R.B. No. 88 at 3, 143 L.R.R.M. at 1124.

[101] *Id.* at 6, 12, 143 L.R.R.M. at 1127, 1132 (Devaney, concurring).

[102] *Id.* at 7, 12, 143 L.R.R.M. at 1127. *See also Electromation*, 309 N.L.R.B. No. 163 at 9–15, 142 L.R.R.M. at 1010–14 (Devaney, concurring).

[103] *E.I. du Pont*, 311 N.L.R.B. No. 88 at 7, 143 L.R.R.M. at 1127–28.

[104] *Id.* at 7, 12, 143 L.R.R.M. at 1128.

[105] *Id.* at 8, 143 L.R.R.M. at 1128.

[106] *Id.* at 10, 143 L.R.R.M. at 1128 (citing *Electromation*, 309 N.L.R.B. No. 163 at 5 n.20, 142 L.R.R.M. at 1013 n.20 (Devaney, concurring)).

Newport News.[107] *Cabot Carbon* and *Newport News*, taken together, provide for strict structural independence between employee groups that propose terms or conditions of work and employers with the power to accept or reject employee proposals.[108] The committees in *E.I. du Pont* were created to make proposals to the employer for consideration by the company management.[109] In addition, these committees were controlled in form and procedure by the employer.[110] Thus, the Board correctly concluded that the committees were employer-dominated labor organizations in violation of section 8(a)(2) of the Act.

The dicta in *E.I. du Pont* which enumerates several permissible cooperative activities or "safe havens" is not helpful, however, to employers who wish to implement participatory work programs in the absence of collective bargaining. The Board attempted to add rationale to the ALJ's decision in *E.I. du Pont* in order to clarify some cooperative schemes which would not violate section 8(a)(2).[111] These "safe havens," however, are simple forms of cooperative schemes which do not cover the types of activities in which many employers believe they must engage to be highly productive and globally competitive. In addition, the boundaries of the "safe havens" are unclear. Absent further litigation, the precise definition of the "safe havens" will not be clarified.

The courts, as well as commentators, have not reached a consensus as to the role of section 8(a)(2).[112] Section 8(a)(2) has been called the "keystone" of the Act because it cements the adversarial model of industrial relations by requiring employee organizations to be completely independent of employers.[113] Others have viewed the adversar-

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[107] *See Cabot Carbon*, 360 U.S. at 213–14, 44 L.R.R.M. at 2207–08; *Newport News*, 308 U.S. at 251, 5 L.R.R.M. at 670.

[108] *See Cabot Carbon*, 360 U.S. at 213–14, 44 L.R.R.M. at 2207–08; *Newport News*, 308 U.S. at 251, 5 L.R.R.M. at 670.

[109] 311 N.L.R.B. No. 88 at 2, 143 L.R.R.M. at 1124.

[110] *E.I. du Pont*, 4-CA-18737-1 *et seq.*, at 13.

[111] *E.I. du Pont*, 311 N.L.R.B. No. 88 at 1, 143 L.R.R.M. at 1123.

[112] *Compare Cabot Carbon*, 360 U.S. at 213–14, 44 L.R.R.M. at 2207–08 (interpreting § 8(a)(2) broadly) *with Scott & Fetzer*, 691 F.2d at 292, 111 L.R.R.M. at 2677 (concluding an overly broad construction of statute would be as destructive as ignoring provision entirely). *See also* Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499, 518 (1986) (calling § 8(a)(2) keystone of NLRA).

[113] Kohler, *supra* note 112, at 518. Professor Kohler describes the collective bargaining system as one in which employees join and assert collective power in order to determine the private law or collective bargaining agreement which will govern the workplace relationship. *Id.* at 515. He further states that inherent conflicts of interest occur between management and its employees, and only through collective action can employees check management's inherent power. *Id.* Thus, Professor Kohler concludes that conflict is a natural part of the American collective bargaining system, but it is checked by the interdependence of the parties. *Id.* at 515–16. This interdependence defines the boundaries of adversarial expression and limits actual conflict. *Id.*

ial model of labor relations as an "anachronism" and an overly broad interpretation of section 8(a)(2) as detrimental to cooperation in the workplace.[114] It is a matter of opinion which view is correct. The state of the law concerning section 8(a)(2), however, is clear—if the employees are represented by a certified bargaining representative then the employer must bargain about cooperative schemes which are established or supported by the employer and which allow employees to make proposals.

If employers are to legally implement true cooperative schemes, then either: (1) Congress must amend or revoke section 8(a)(2), (2) the United States Supreme Court must reinterpret section 8(a)(2), or (3) the Board must defy the Supreme Court's broad interpretation of section 8(a)(2) in *Cabot Carbon*. Each alternative has limitations. Amendment or revocation by Congress is the most permanent and authoritative option, but it is also the most difficult to effectuate. In light of the lack of consensus as to the best approach under section 8(a)(2), the likelihood of Congress reaching conensus on this issue is slim. Reinterpretation of the *Cabot Carbon* standard by the Court would be an effective method, but such a decision would be suspect in light of the strong indicia of congressional intent outlined in *Cabot Carbon*. Finally, reinterpretation by the Board is subject to the same problems as reinterpretation by the Court, but is compounded by the fact that various circuit courts, or the Supreme Court, probably may not let the Board depart from precedent.

In sum, the Board held in *E.I. du Pont* that an employer violated section 8(a)(2) of the Act by establishing and dealing with several employee participation committees comprised of union member-employees and members of management.[115] The Board relied upon the seminal Supreme Court case interpreting section 2(5), *Cabot Carbon*, to reach its holding.[116] In addition, the Board outlined several "safe havens" in which employers may engage in communication with employees without violating section 8(a)(2).[117] The Board's attempt to clarify this area of the law, however, probably will not serve employers who wish to institute complex employee participation programs outside of collective bargaining.

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[114] *Scott & Fetzer*, 691 F.2d at 292–93, 111 L.R.R.M. at 2677.
[115] 311 N.L.R.B. No. 88 at 1, 3, 143 L.R.R.M. at 1122–23, 1124.
[116] *Id.* at 2–3, 143 L.R.R.M. at 1123–24.
[117] *Id.*

C. **Defining the Contours of Mandatory Collective Bargaining Under § 158 of the National Labor Relations Act:* United Food and Commercial Workers International Union Local 150-A v. NLRB[1]

Sections 158(a) and (d) of the National Labor Relations Act ("NLRA" or "Act") together impose upon an employer a duty to bargain collectively with its employees' union representatives with respect to "wages, hours, and other terms and conditions of employment."[2] This mandatory duty to bargain collectively does not compel corporate management to abandon its discretion in operating its business and acquiesce to union proposals.[3] Rather, this congressional mandate merely requires that an employer bargain in good faith with union representatives until an agreement is reached, or to the point of impasse.[4] Thus, the Act serves to facilitate the peaceful settlement of potentially divisive labor-management controversies through the neutral framework of negotiation.[5] Employers unilaterally instituting changes affecting employment issues that fall within the statutory sphere of mandatory collective bargaining are subject to remedial measures by the National Labor Relations Board ("NLRB" or "Board").[6] Thus, a major task confronting the Board and the federal

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[1] 1 F.3d 24, 143 L.R.R.M. 3001 (D.C. Cir. 1993) [hereinafter *Dubuque Packing IV*].

[2] National Labor Relations Act, 29 U.S.C. § 158 (1988). Section 158(a) provides:

> It shall be an unfair labor practice for an employer—
>
> . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees . . . .

Section 158(d) states in pertinent part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .

Id.

[3] *See* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 678–79 nn.16–17, 107 L.R.R.M. 2705, 2710 nn.16–17 (1981).

[4] *See id.* at 675, 107 L.R.R.M. at 2708. Within the limited sphere of wages, hours, and terms and conditions of employment, the Act does not compel an employer to reach an agreement with union representatives on all matters, although an employer would have to risk the potential economic consequences of union retaliatory measures. *See id.* at 674–75, 107 L.R.R.M. at 2708.

[5] Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 211, 57 L.R.R.M. 2609, 2612 (1964). The intransigence demonstrated by both management and labor was recognized as one of the most "prolific causes of strife" in the U.S.; the NLRA was established to resolve these conflicts and preserve the peaceful flow of interstate commerce. *Id.* The NLRB was designed to enforce the Act's provisions by condemning certain acts as unfair labor practices. *First Nat'l*, 452 U.S. at 674, 107 L.R.R.M. at 2708.

[6] *First Nat'l*, 452 U.S. at 674–75, 107 L.R.R.M. at 2708. The Board's power, however, is limited to condemning only that conduct which violates the Act's requirement for mandatory collective bargaining on subjects constituting "wages, hours and other terms and conditions of employ-

courts is to provide employers with a degree of certainty in planning their affairs by clearly defining the scope of corporate decisions covered by the statutory language "terms and conditions of employment."[7]

In 1964, in *Fibreboard Paper Products Corp. v. NLRB*, the United States Supreme Court held that an employer's unilateral replacement of existing union labor with subcontracted personnel performing the same maintenance work under similar conditions constituted a violation of the Act's mandatory duty to bargain.[8] Although the Court found the employer's conduct was motivated purely by economic considerations, as opposed to anti-union sentiments, it nonetheless viewed the subcontracting of plant maintenance work previously performed by union members to be an activity affecting a "condition of employment."[9] The company admitted to the Union, and to the Court, that its decision to subcontract stemmed from the cost savings expected from work-force reductions, fringe-benefit decreases, elimination of overtime payments, and other terms which have traditionally been the subject of collective bargaining.[10] Referring to the Act's unambiguous purpose of incorporating the termination of employment as an area subject to mandatory bargaining, the Court noted that the subcontracting of any company work necessarily results in a loss of union jobs and, therefore, is a mandatory subject of collective bargaining under § 158(a).[11]

Concerned with the potentially broad implications of the *Fibreboard* majority opinion, Justice Stewart, in a concurring opinion, sought to confine the Court's decision to the particular facts of the case.[12] Justice Stewart argued that the legislative history and purpose

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ment." *See id.* at 674, 107 L.R.R.M. at 2709. With respect to these mandatory subjects of collective bargaining, the Board ensures that management and union representatives bargain in good faith to agreement or to the point of impasse. *Id.* at 675, 107 L.R.R.M. at 2708. Other subjects not related to employment are labelled as permissive subjects of collective bargaining. *Id.* at 683, 107 L.R.R.M. at 2711. Permissive subjects may be raised at the bargaining table to be discussed in good faith and incorporated into an enforceable collective bargaining agreement, but there is no requirement to do so. *Id.* at 675 n.13, 107 L.R.R.M. at 2708 n.13. Similarly, management and union representatives have no authority to insist on these permissive subjects during the collective bargaining process to the point of impasse and the Board has no authority over these subjects. *See id.*

[7] *See Dubuque Packing IV*, 1 F.3d at 28, 143 L.R.R.M. at 3004.

[8] 379 U.S. at 215, 57 L.R.R.M. at 2613.

[9] *Id.* at 208, 210, 57 L.R.R.M. at 2611, 2612.

[10] *Id.* at 213–14, 57 L.R.R.M. at 2613.

[11] *Id.* at 210, 57 L.R.R.M. at 2612.

[12] *See id.* at 218, 57 L.R.R.M. at 2615 (Stewart, J., concurring). Justice Stewart believed the decision suggested an expansive interpretation of the NLRA contrary to both the Act's intended purpose and to the decisions of several other circuits. *See id.* at 221, 57 L.R.R.M. at 2616 (Stewart, J., concurring).

of the Act strongly supported a narrow construction of the type of management decisions subject to mandatory collective bargaining.[13] According to Justice Stewart, managerial decisions forming the "core of entrepreneurial control," or which have only an indirect and uncertain impact on employment, are unrelated to conditions of employment, and are therefore exempt from compulsory collective bargaining.[14] Accordingly, although the Court found that the employer in *Fibreboard* had a duty to bargain collectively over its decision to subcontract maintenance work, Justice Stewart declared that the holding should not be read to imply that every management decision necessarily leading to a termination of union jobs or adversely affecting the employer-employee relationship is subject to that same duty.[15]

Mindful of Justice Stewart's cautionary language in *Fibreboard*, the United States Supreme Court, in the 1981 case of *First National Maintenance Corp. v. NLRB*, refused to impose a mandatory duty to bargain upon an employer who failed to negotiate with union representatives over its economically-motivated decision to terminate a service contract.[16] In *First National*, an employer engaged in providing janitorial services to a variety of businesses unilaterally cancelled its contract with a nursing home after its efforts failed to achieve acceptable profits at that site.[17] The termination of the contract resulted in the discharge of several union employees.[18] In determining that the employer was under no duty to bargain with union representatives over its decision, the Court found that the termination of the nursing home contract fell into a category of decisions that was neither clearly covered by nor clearly excluded from the Act's "terms and conditions of employment"

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[13] *See Fibreboard*, 379 U.S. at 220, 57 L.R.R.M. at 2616 (Stewart, J., concurring).

[14] *Id.* at 223, 57 L.R.R.M. at 2617 (Stewart, J., concurring). Justice Stewart included decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales as core management decisions which should remain uninhibited. *Id.*

[15] *Id.* at 218, 57 L.R.R.M. at 2615 (Stewart, J., concurring). Justice Stewart did recognize, however, that union demands for provisions limiting an employer's power to discharge employees are mandatory subjects of bargaining. *Id.* at 222, 57 L.R.R.M. at 2617 (Stewart, J., concurring). Thus, Justice Stewart acknowledged that employment security has been recognized as a subject of § 158 even though it may be argued that the existence of jobs is not truly a condition of employment. *Id.* at 222, 57 L.R.R.M. at 2616–17 (Stewart, J., concurring). Such provisions include freedom from discriminatory discharge, seniority rights, and the imposition of a compulsory retirement age. *Id.* at 222, 57 L.R.R.M. at 2617 (Stewart, J., concurring). Justice Stewart, in this particular case, found the subcontracting conduct analogous to these provisions, and thus subject to mandatory bargaining, because it was largely equivalent to the substitution of one group of workers for another to perform the same work in the same environment. *Id.* at 224, 57 L.R.R.M. at 2617 (Stewart, J., concurring).

[16] First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 686, 107 L.R.R.M. 2705, 2713 (1981).

[17] *Id.* at 668–69, 107 L.R.R.M. at 2706.

[18] *Id.* at 669, 107 L.R.R.M. at 2706.

subject to mandatory collective bargaining.[19] The Court acknowledged that the employer's decision primarily concerned the economic profitability of the contract and was, therefore, "akin to a decision to be in business at all."[20] The Court, however, also recognized the direct and substantial impact such a decision would have on the continued employment of union members.[21]

Faced with a decision of utmost concern to both management and union representatives, the *First National* Court adopted a balancing test to determine whether an employer's decision is sufficiently tied to a condition of employment to warrant mandatory collective bargaining.[22] The Court declared that managerial decisions having a substantial impact on the existence of employment are subject to mandatory bargaining only if the potential benefits to the labor-management relationship and the collective bargaining process outweigh the burdens imposed on the operation of the business.[23] The *First National* Court found that this balancing test emphasizes both the amenability of the subject matter to the bargaining process and the burdens that bargaining would place upon an employer's need for unencumbered discretion in managing its affairs.[24]

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[19] *See id.* at 676–77, 107 L.R.R.M. at 2709. The Court defined three categories of management decisions. *Id.* at 677, 107 L.R.R.M. at 2709. The first category covers those decisions which are purely entrepreneurial in nature and, therefore, have only an indirect and attenuated impact on the employment relationship. *Id.* There is no obligation to bargain over these decisions. *See id.* at 676–77, 107 L.R.R.M. at 2709. Such decisions include, for example, choice of advertising and promotion, product type and design and financing arrangement. *Id.* The second category involves decisions which are exclusively an aspect of the employer-employee relationship and are clearly mandatory subjects of collective bargaining. *Id.* at 677, 107 L.R.R.M. at 2709. These decisions include, for example, layoffs and recalls, production quotas, and work rules. *Id.* A newly articulated third category includes decisions that have a direct impact on employment of union members, because jobs are eliminated, but that also involve a fundamental change in the scope and direction of the business. *Id.* These latter decisions must be evaluated in light of the particular circumstances of the case to determine if they are subject to or exempt from mandatory collective bargaining under the Act. *See id.*

[20] *See id.* at 677, 107 L.R.R.M. at 2709.

[21] *See First Nat'l*, 452 U.S. at 677, 107 L.R.R.M. at 2709.

[22] *See id.* at 679, 107 L.R.R.M. at 2710. The Court reasoned that because Congress did not explicitly define those areas excluded from mandatory bargaining, the need for unencumbered decision making and the degree of certainty required by employers in the management of ordinary business affairs necessitated the adoption of a balancing test. *See id.*

[23] *Id.* The Court's balancing test serves the fundamental purpose of the Act by preventing all management decisions from being subjected to mandatory bargaining, an extreme act that "could afford the union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose." *See id.* at 683, 107 L.R.R.M. at 2711.

[24] *See id.* at 678–79, 107 L.R.R.M. at 2710.

Applying its balancing test to the facts at issue, the *First National* Court noted that the employer had no intention of replacing the discharged employees or moving that operation elsewhere.[25] Moreover, the dispute with the nursing home centered on the size of the management fee, an issue over which the union had no control.[26] Thus, the Court concluded that the costs associated with denying the employer the right to freely terminate its profitless contract with the nursing home and effect a significant change in its operations clearly outweighed any incremental benefits that might be gained through the union's participation in the decision-making process.[27] Consequently, the Court refused to impose a mandatory duty to bargain.[28] The Court did not, however, discuss the probable effects of its ruling on other areas of managerial discretion, indicating that future cases must be decided on the balance of their particular facts.[29]

During the *Survey* year, in *United Food and Commercial Workers International Union Local 150-A v. NLRB* [herinafter *Dubuque Packing IV*], the United States Court of Appeals for the District of Columbia upheld an NLRB decision requiring an employer to bargain collectively with union representatives over its decision to relocate a segment of its factory operations.[30] As part of its decision, the court evaluated and endorsed the Board's newly crafted test for determining whether the relocation of specific unit work is a mandatory subject of collective bargaining.[31] The court found the standard promulgated by the Board consistent with the principles set forth by United States Supreme Court precedent and adequately protective of the employer's "prerogative to manage its business."[32] Thus, the court upheld the Board's decision to subject the relocation decision to mandatory bargaining.[33]

The dispute in *Dubuque Packing IV* arose in 1981 when the Dubuque Packaging Company ("Dubuque"), a processor and packager of beef and pork, notified union management of its plans to perma-

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[25] *Id.* at 687, 107 L.R.R.M. at 2713.

[26] *First Nat'l*, 452 U.S. at 687, 107 L.R.R.M. at 2713.

[27] *Id.* at 686, 107 L.R.R.M. at 2713. The fact that the management fee with the nursing home was the prime focus of the dispute was of particular importance in the court's analysis. *See id.* at 687, 107 L.R.R.M. at 2713. Neither the union nor the employer had the power to force the third party nursing home to make concessions; thus negotiations with the union would have been futile. *See id.*

[28] *Id.* at 686, 107 L.R.R.M. at 2713.

[29] *Id.* at 686 n.22, 107 L.R.R.M. at 2713 n.22.

[30] *Dubuque Packing IV*, 1 F.3d 24, 25, 143 L.R.R.M. 3001, 3002 (D.C. Cir. 1993).

[31] *Id.*

[32] *See id.* at 31, 143 L.R.R.M. at 3007.

[33] *See id.* at 25, 143 L.R.R.M. at 3002.

nently shut down the unprofitable hog kill and cut operations at its home plant in Dubuque, Iowa.[34] In subsequent negotiations aimed at sustaining the Dubuque factory operations, Dubuque requested concessions in the form of a wage freeze.[35] This wage-freeze proposal violated Dubuque's previous 1980 agreement where it promised to seek no further concessions for the remainder of the union contract's term in exchange for concessions from the union totalling approximately $5 million per annum.[36] Following the union's initial rejection of the wage-freeze proposal, Dubuque announced that it was considering relocating, rather than closing, the factory operations.[37] Ignoring the union's repeated requests for bargaining meetings and detailed company financial data substantiating the need for concessions, Dubuque opened a new hog kill and cut operation in Rochelle, Illinois, simultaneously eliminating the approximately 530 similar jobs at the Dubuque plant.[38]

In response to these actions, the union filed unfair labor practice complaints with the NLRB claiming that Dubuque had failed to bargain in good faith.[39] An Administrative Law Judge (ALJ) ruled, and the Board affirmed, that Dubuque had no duty to bargain over its decision to relocate operations.[40] On appeal, the D.C. Court of Appeals remanded the case, stating that insufficient reasoning in the Board's opinion and conflicting standards articulated in previous Board decisions precluded the court from ascertaining the precise rule of law applied by the Board.[41] In its instructions, the D.C. Circuit strongly encouraged the Board to adopt a single, majority-supported standard

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[34] *Id.* at 26, 143 L.R.R.M. at 3003.

[35] *Dubuque Packing IV*, 1 F.3d at 26, 143 L.R.R.M. at 3003.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Dubuque Packing IV*, 1 F.3d at 27, 143 L.R.R.M. at 3003.

[41] United Food and Commercial Workers Int'l Union Local 150-A v. NLRB, 880 F.2d 1422, 1423, 132 L.R.R.M. 2104, 2105–06 (D.C. Cir. 1989) [hereinafter *Dubuque Packing II*]. The *Dubuque Packing II* court noted that the Board had no single standard for determining whether an employer had breached its duty to bargain with union representatives over a plant relocation. *See id.* at 1431, 132 L.R.R.M. at 2111–12. Rather, the Board in most cases relied primarily on three separate minority-supported tests promulgated in *Otis Elevator Co.*, 269 N.L.R.B. 891, 115 L.R.R.M. 1281 (1984). *See Dubuque Packing II*, 880 F.2d at 1431, 132 L.R.R.M. at 2111–12. Even though the court held that each of the three *Otis Elevator* tests were reasonably defensible tests for determining whether plant relocations are mandatory subjects of collective bargaining, the court was critical of the Board's simple acceptance of ALJ rulings based on its assertion that the ruling was legally sufficient "under-any-[minority]-view" expressed in *Otis Elevator*. *See id.* at 1434, 1437, 132 L.R.R.M. at 2114, 2116.

for determining whether a particular employer's decision is a mandatory subject of collective bargaining.[42]

On remand, the Board formulated and unanimously approved a single test for determining whether an employer has a duty to bargain with union representatives over plant relocations.[43] Cognizant of the varied circumstances surrounding relocation decisions, the Board refused to categorize all such decisions as either mandatory or permissive subjects of collective bargaining.[44] Accordingly, the Board directed its inquiry to whether bargaining over a particular relocation decision will advance the neutral purpose of the Act.[45] Under the Board's test, the initial burden is on the General Counsel of the NLRB to establish that the employer's relocation of unit work was unattended by a basic change in the nature of the employer's operation.[46] If this initial burden is successfully met, the General Counsel will have established a prima facie case that the employer's relocation decision is a mandatory subject of collective bargaining.[47] An employer may rebut the General Counsel's prima facie case by producing evidence demonstrating that the work performed at the new location varies significantly from the work performed at the former plant, that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or that the employer's decision involves a change in the scope or direction of the company.[48] Alternatively, an employer may defend itself by showing by a preponderance of the evidence that its decision to relocate unit work is not subject to mandatory collective bargaining because (1) labor costs (direct and/or indirect) were not a factor in the decision or (2) even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.[49] Applying this new test,

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[42] *Dubuque Packing II*, 880 F.2d at 1436–37, 132 L.R.R.M. at 2116.

[43] *Dubuque Packing Co.*, 303 N.L.R.B. 386, 391, 137 L.R.R.M. 1185, 1192 (1991) [hereinafter *Dubuque Packing III*], *enforced*, United Food and Commercial Workers Int'l Union Local 150-A v. NLRB, 1 F.3d 24, 143 L.R.R.M. 3001 (D.C. Cir. 1993).

[44] *Dubuque Packing III*, 303 N.L.R.B. at 390, 137 L.R.R.M. at 1191.

[45] *Id.*

[46] *Id.* at 391, 137 L.R.R.M. at 1192.

[47] *Id.*

[48] *Id.* at 391, 137 L.R.R.M. at 1192.

[49] *Dubuque Packing III*, 303 N.L.R.B. at 391, 137 L.R.R.M. at 1192. Direct labor costs are items such as wages and fringe benefits, while indirect labor costs involve no-cost items with a potential economic impact, such as seniority or manning requirements. *Decision Bargaining After First National Maintenance*, Prac L. Inst., Aug. 5, 1993, *available in* LEXIS, Lawrev Library, Allrev File. Under the Board's test, if labor costs are an irrelevant factor in the relocation decision, bargaining will not be required because union involvement in the decision process provides little, if any, benefit. *See Dubuque Packing III*, 303 N.L.R.B. at 391, 137 L.R.R.M. at 1192. Likewise, if the union

the Board found that Dubuque breached its statutory duty to bargain over the relocation of its factory operations.[50]

On appeal, the D.C. Court of Appeals upheld the Board's determination that Dubuque's relocation decision was properly subject to mandatory bargaining.[51] Specifically, the court found that the Board's newly-crafted standard represented a permissible reading of the NLRA and Supreme Court precedent.[52] Additionally, it dismissed Dubuque's claim that the standard was improperly applied to the facts of the case.[53]

The court began its opinion by evaluating the legality of the Board's newly promulgated standard.[54] The court was primarily concerned with whether the Board could legally impose a duty to bargain on an employer when all elements of the test are proved in favor of the union.[55] The court approached this task by dissecting the Board's standard into three distinct layers of analysis.[56]

The court determined that the first layer of the Board's analysis appropriately concentrated on the objective differences between the old and new operations.[57] Under the Board's test, after the General Counsel has established its prima facie case, an employer can exempt itself from the statutory duty to negotiate and may take unilateral action if it demonstrates that the proposed relocation involves a fundamental change in the scope or direction of the business.[58] Such fundamental alterations in the scope or direction of an employer's business, the court reasoned, are objective manifestations of core managerial decisions and permit an employer to relocate without negotiating.[59] Accordingly, the court held that the Board's objective evaluation of the evidence preserves an employer's right to unfettered entrepreneurial control.[60]

The second layer, observed the court, focused on the employer's first potential affirmative defense.[61] The court stated that this layer is

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is unable or unwilling to offer concessions sufficient to offset the relocation, the decision is not amenable to the bargaining process. *Id.*

[50] *Dubuque Packing III*, 303 N.L.R.B. at 396–97, 137 L.R.R.M. at 1197.

[51] *Dubuque Packing IV*, 1 F.3d 24, 25–26, 143 L.R.R.M. 3001, 3002 (D.C. Cir. 1993).

[52] *Id.*

[53] *Id.*

[54] *Id.* at 30, 143 L.R.R.M. at 3006–07.

[55] *Id.* at 30, 143 L.R.R.M. at 3006.

[56] *Dubuque Packing IV*, 1 F.3d at 30, 143 L.R.R.M. at 3006.

[57] *See id.*

[58] *Id.* at 29, 143 L.R.R.M. at 3006.

[59] *Id.* at 30, 143 L.R.R.M. at 3006.

[60] *See id.*

[61] *See Dubuque Packing IV*, 1 F.3d at 30, 143 L.R.R.M. at 3006.

a subjective inquiry into the employer's underlying motivations for the relocation decision.[62] Under the Board's test, an employer relocating its business without any objective differences in the operations may defend its decision by demonstrating, by a preponderance of the evidence, that labor costs were not a consideration.[63] The court indicated that this prong of the analysis is a useful discretionary tool for distinguishing relocation decisions induced largely by labor cost savings from those motivated by other perceived advantages of the new location.[64] The former category of decisions is suitable for mandatory bargaining, while the latter category is not.[65]

The final layer of the Board's analysis, as identified by the court, involved the applicability of the test's second affirmative defense, which the court labeled a "futility" provision.[66] Under this provision, an employer can relocate without prior negotiations if it can show that, although labor costs were a consideration in the decision, the union was unable, or unwilling, to offer financial concessions sufficient to offset the expected savings of the relocation.[67] Thus, the court implicitly acknowledged that the Board's test comports with the Act's central purpose of promoting collective bargaining only when an employer's decision is amenable to resolution by that process and is potentially beneficial to the labor-management relationship.[68] The court also agreed with the Board's declaration that, when circumstances demand

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[62] *Id.*

[63] *Id.* at 29–30, 143 L.R.R.M. at 3006.

[64] *See id.* at 30, 143 L.R.R.M. at 3006. *Compare* Reece Corp., 294 N.L.R.B. 448, 131 L.R.R.M. 1413 (1989) (decision to relocate unit work motivated by employer's failure to obtain economic relief from union and inability to persuade union to accept labor cost reductions after contract went into effect) *and* Pertec Computer Corp., 284 N.L.R.B. 810, 126 L.R.R.M. 1134 (1987), *supplemental decision sub nom.*, Triumph-Adler-Royal, 298 N.L.R.B. 609, 134 L.R.R.M. 1131 (1990) (decision to transfer work based on consultants' cost study showing potential savings of $2.6 million, $2 million of which was attributed to labor costs) *with* Metropolitan Teletronics, 279 N.L.R.B. 957, 122 L.R.R.M. 1107 (1986) (decision to relocate motivated by foreclosure on former facility, lower mortgage interest rate and more spacious quarters at the new facility, and the prospect of government assistance) *and* Inland Steel Container Co., 275 N.L.R.B. 929, 119 L.R.R.M. 1293 (1985) (decision to relocate unit work motivated by outdated facility, limited space for growth and flooding in facility) *pet. for review denied sub nom.*, Steelworkers Local 2179 v. NLRB, 822 F.2d 559, 125 L.R.R.M. 3313 (5th Cir. 1987).

[65] *See Dubuque Packing IV*, 1 F.3d at 32, 143 L.R.R.M. at 3008.

[66] *Id.* at 30, 143 L.R.R.M. at 3006.

[67] *Id.* at 29–30, 143 L.R.R.M. at 3006. The court's analysis of this prong was premised on its belief that the Board intended this defense to encompass not only those situations where it was impossible for the union to make concessions equal to the potential savings, but also those situations where the employer could reasonably establish, by precedent or other evidentiary methods, that the union would refuse to make concessions. *See id.* at 30–31, 143 L.R.R.M. at 3006–07.

[68] *See id.* at 28–32, 143 L.R.R.M. at 3005–07.

a relocation decision be implemented expeditiously, the Board may liberally define when a mandatory negotiation session has reached a bona-fide impasse, thereby permitting an employer to act unilaterally.[69]

The court concluded its analysis by declaring that the Board may reasonably impose a duty to bargain when all layers of the test are resolved in favor of the union.[70] According to the court, the exemptions in the test still afford the employer significant authority over the conduct of its own business.[71] Specifically, when facing a relocation decision, only those relocations that leave the firm occupying the same entrepreneurial position, that were taken because of the cost of labor and that offer a realistic hope for a negotiated settlement are mandatory subjects of collective bargaining.[72] The court agreed with the Board's determination that the benefits to be gained from bargaining over these particular relocation decisions outweighed the burdens placed on the employer's managerial discretion.[73]

After considering the legality of the Board's test, the court considered whether the Board's test was a permissible reading of Supreme Court precedent.[74] The court affirmed the Board's determination that a plant relocation decision is more closely analogous to the subcontracting decision found mandatory in *Fibreboard*, than to the partial business closure in *First National*, where the employer had no duty to bargain.[75] A relocation decision subject to mandatory bargaining under the Board's test does not involve objective differences in the scope

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[69] *Id.* at 30, 143 L.R.R.M. at 3006. The *First National* Court observed that, in a plant closure situation, management may have to move swiftly and secretly in order to take advantage of significant tax or securities benefits. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 682–83, 107 L.R.R.M. 2705, 2711 (1981). These benefits may be affected by publicity, or the timing of the plant closing and reorganization of the corporate structure. *Id.*

[70] *Dubuque Packing IV*, 1 F.3d at 32, 143 L.R.R.M. at 3007.

[71] *Id.* at 31, 143 L.R.R.M. at 3007.

[72] *Id.* at 31–32, 143 L.R.R.M. at 3007.

[73] *Id.* at 32, 143 L.R.R.M. at 3007.

[74] *Id.*

[75] *Dubuque Packing IV*, 1 F.3d at 32, 143 L.R.R.M. at 3007–08. In crafting its test, the Board extracted and was particularly solicitous of what it considered to be the three critical factors underlying the *Fibreboard* and *First National* decisions. *Dubuque Packing III*, 303 N.L.R.B. 386, 390–91, 137 L.R.R.M. 1185, 1191 (1991). First, the Board recognized that in *First National*, the employer did not intend to replace the discharged employees or move the operation to another site, while the employer in *Fibreboard* merely substituted one group of employees for another. *Id.* at 390, 137 L.R.R.M. at 1192. Second, the Board pointed to the significant business alteration confronting the employer in *First National*. *Id.* With the employer in *Fibreboard*, there was no major shift in the business strategy or product base where the employer merely dismissed union employees and replaced them with an independent contractor. *Id.* Third, the employer's decision in *First National* was based on the size of the management fee the nursing home was willing to pay, a matter over which the union had no control. *Id.* at 391, 137 L.R.R.M. at 1192. In contrast, the employer's decision in *Fibreboard* was motivated largely by labor-cost savings. *Id.*

or direction of the employer's basic operations such that the employer can claim a core entrepreneurial decision was made.[76] Additionally, under the subjective inquiry, the reduction of labor costs is the employer's primary motivation for the relocation.[77] Lastly, the union maintains control over the basis for the employer's decision to relocate, thereby making the dispute amenable to the collective-bargaining process.[78]

In upholding the Board's test, the court first rejected Dubuque's contention that the opinions of the United States Supreme Court in both *Fibreboard* and *First National* implicitly exempt relocation decisions from bargaining.[79] Dubuque argued that because of the large expenditure of capital incurred, relocation decisions should be within the exclusive province of management.[80] The court concluded, however, that while both *First National* and *Fibreboard* clearly advocate limited restrictions on management's investment of capital, they do not unambiguously exempt all such decisions from the collective-bargaining process.[81] Absent any strict prohibitions by the Supreme Court in this area, the court was compelled to respect the policy choices reflected in the Board's formulation of the test, particularly because it viewed those choices as reasonable.[82] The court found the Board's explicit exemptions and potential defenses sufficiently protective of management's capital investment decisions.[83] The court also recognized the Board's understanding that many bargaining decisions affecting terms and conditions of employment are tied to investment of capital.[84] The court reasoned that excluding these decisions from the protections afforded labor unions under the Act, merely because they infringe on corporate control of capital expenditures, would be inconsistent with the fundamental purposes of the NLRA.[85]

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[76] *Dubuque Packing IV*, 1 F.3d at 32, 143 L.R.R.M. at 3007.

[77] *Id.* at 32, 143 L.R.R.M. at 3008.

[78] *Id.*

[79] *Id.*

[80] *Id.* This argument refers to Justice Stewart's concurring opinion in *Fibreboard*. *Id.* Justice Stewart stated "subcontracting falls short of such larger entrepreneurial questions as what shall be produced, [and] how capital shall be invested in fixed assets . . . ." Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 225, 57 L.R.R.M. 2609, 2618 (1964) (Stewart, J., concurring).

[81] *Dubuque Packing IV*, 1 F.3d at 32, 143 L.R.R.M. at 3008.

[82] *See id.*

[83] *Id.* The court viewed the exemptions as relatively broad and, therefore, constituting a sufficient panoply for the employer. *See id.* The court did concede that large scale shifts in capital are unlikely candidates for mandatory bargaining. *Id.* The court cited as an example any shift from a labor-intensive production line to a fully automated factory. *Id.*

[84] *Id.*

[85] *See id.*

The court next dismissed Dubuque's argument that the Board's standard failed to provide the degree of certainty necessary for an employer to reach decisions without fear of later evaluations labeling its conduct as an unfair labor practice.[86] The court acknowledged that the Board's test undoubtedly leaves areas of uncertainty between those decisions subject to mandatory bargaining and those that are exempt.[87] Nevertheless, the court stated that this "ambiguity at the margins" does not invalidate the test and that the contours of these boundaries will be more clearly defined in future adjudications.[88]

The *Dubuque Packing IV* court then affirmed the Board's application of its new test to the facts, and held that Dubuque indeed breached its statutory duty to bargain collectively over the relocation of its hog kill and cut operations.[89] In so holding, the court discarded Dubuque's assertion that because the Rochelle plant was a more modern and efficient facility, the decision to relocate the operations constituted a fundamental change in the scope and direction of the business.[90] The court noted that its decision was buttressed by the ALJ's findings, which determined that the operations of the two plants were essentially identical.[91]

Moreover, the court disagreed with Dubuque's claim that the union's repeated rejections of its wage-freeze proposal allowed it to invoke the futility provision of the Board's test as an affirmative defense to the union's unfair labor practice claim.[92] Dubuque argued that the union conduct manifested an inability or unwillingness to offer sufficient concessions to sustain the Dubuque factory operations.[93] Thus, Dubuque saw no lawful obligation to bargain with union representatives over its relocation decision.[94] The court, however, noted that past negotiations with the union had been productive and nothing in the record indicated a different result in this particular instance.[95] The court found that the union's overwhelming rejection of Dubuque's initial wage-freeze proposal was not an indication of intransigence, but

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[86] *Dubuque Packing IV*, 1 F.3d at 32–33, 143 L.R.R.M. at 3008.

[87] *Id.*

[88] *Id.* at 33, 143 L.R.R.M. at 3008.

[89] *Id.* at 33–34, 143 L.R.R.M. at 3009.

[90] *Id.* at 33, 143 L.R.R.M. at 3009.

[91] *See Dubuque Packing IV*, 1 F.3d at 33, 143 L.R.R.M. at 3009. The primary purpose of both plants was to "slaughter hogs, dress carcasses, and to process pork into hams, bacon and sausage." *Id.*

[92] *Id.* at 33–34, 143 L.R.R.M. at 3009.

[93] *Id.* at 34, 143 L.R.R.M. at 3009.

[94] *See id.*

[95] *See id.*

mere union posturing and an insistence that Dubuque agree to bargain in good faith by providing the relevant financial data.[96] The court held, therefore, that the Board's decision that Dubuque had breached its duty to bargain was substantially supported by the facts.[97]

The court's affirmation of the Board's test in *Dubuque Packing IV* provides an analytical framework for evaluating whether an employer's decision to relocate part of its business operations constitutes a term or condition of employment.[98] The test requires an essentially factual inquiry into three separate areas: the objective differences in the nature and scope of the current and former operations, the influence of labor costs savings in the decision process, and the impossibility or unwillingness of union representatives to offer labor concessions sufficient to offset the potential benefits of a relocation.[99] The results of this analysis, as the court warned, will not always be predictable in the early stages of the application of the test.[100] The test should, however, provide a reasonable guide until the policy and approach of the Board becomes apparent in subsequent adjudications.[101]

Although the Board's test certainly attempts to provide more guidance and predictability for employers deciding to relocate their plant operations, the test appears susceptible to subjective decision-making by the Board in the determination of the reasons underlying the employer's relocation decision. This subjective analysis could unreasonably harm the interests of the union should the employer claim as an affirmative defense that labor costs were not a factor in the decision process. As a prophylactic measure, the Board's post-hoc examination of the justifications for an employer's relocation should clearly focus on the *actual* motivations at the time of the decision, not the *potential* justifications conceived by the employer after an unfair labor practice suit is initiated.[102] This will ensure that the fundamental purpose of the Act is not subverted by the creative skills of the employer or the employer's lawyer. Such a focus does not preclude the Board from considering post-relocation events in evaluating an employer's motivation. Rather, it simply limits the analysis primarily to factual data existing prior to or contemporaneously with the relocation decision.

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[96] *Dubuque Packing IV*, 1 F.3d at 34, 143 L.R.R.M. at 3009.

[97] *Id.*

[98] *Id.* at 30, 143 L.R.R.M. at 3006.

[99] *Id.*

[100] *See id.* at 33, 143 L.R.R.M. at 3008.

[101] *Dubuque Packing IV*, 1 F.3d at 33, 143 L.R.R.M. at 3008.

[102] *See Dubuque Packing III*, 303 N.L.R.B. 386, 392 n.14, 137 L.R.R.M. 1185, 1192 n.14 (1991).

Along the same lines, the Board's evaluation of the relocation decision should not consider merely those issues susceptible to monetary calculations. Other, less tangible factors, such as moving to a "potentially" more profitable region of the country, should be considered in the analysis if they are logically supported. The test, however, does not clearly allow an employer to ascertain whether the Board will accord any weight to these factors.

Lastly, the Board's test is limited solely to relocation decisions. Much like the decision in *First National*, the decision does not articulate a standard for resolving other labor-management disputes falling outside the clearly defined boundaries of core managerial decisions or pure employer-employee relationship matters. Thus, while an employer might be able to reasonably anticipate the consequences of a relocation after this case, the legality of its conduct in other areas of similar importance remains uncertain.

In summary, in *Dubuque Packing IV*, the United States Court of Appeals for the District of Columbia approved the test promulgated by the National Labor Relations Board for determining whether an employer's decision to relocate unit work will be subject to mandatory collective bargaining.[103] The employer must submit the decision to the collective bargaining process unless the relocation constitutes a fundamental change to the business, or, alternatively, the employer proves that the relocation was initiated for reasons other than potential labor cost savings, or the union was unable or unwilling to offer sufficient concessions to offset the potential savings.[104] The court held that the test is consistent with and does not depart from previous Supreme Court decisions interpreting an employer's duty to bargain collectively with union representatives over terms and conditions of employment.[105] In fact, the test employs a more concrete, fact-oriented version of the balancing test proposed by the *First National* Court which an employer may find useful in planning its business affairs.

D. **Good Faith Bargaining and Employers' Obligation to Substantiate Collective Bargaining Claims:* United Steelworkers of America, Local 14534 v. NLRB[1]

Section 8(a)(5) of the National Labor Relations Act ("NLRA") obligates employers to bargain in good faith with their employees'

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[103] *Dubuque Packing IV*, 1 F.3d at 25, 143 L.R.R.M. at 3002.

[104] *Id.* at 29–30, 143 L.R.R.M. at 3006.

[105] *Id.* at 25, 143 L.R.R.M. at 3002.

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[1] 983 F.2d 240, 142 L.R.R.M. 2177 (D.C. Cir. 1993).

representatives.[2] In addition, section 8(d) of the NLRA extends the good faith obligation to wages, hours and other terms and conditions of employment.[3] Claims with respect to such highly relevant issues must be honest, and in some cases may require substantiation.[4] Generally, when an employer alleges a financial inability to meet a union's demands, the employer must substantiate that claim by disclosing its financial records to the union.[5] Other employer allegations, such as competitive disadvantage, may not require substantiation.[6]

In 1956, in *NLRB v. Truitt Manufacturing Co.*, the United States Supreme Court held that an employer's refusal to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith.[7] Truitt Manufacturing Co. ("Truitt") denied the union's wage increase request of ten cents per hour.[8] Truitt asserted that it was undercapitalized, had never paid dividends, and would be put out of business by any increase above two and a half cents per hour.[9] Truitt then refused to substantiate its claims through disclosure of financial information to the union.[10]

The Court observed that section 8 good faith bargaining requires claims made during negotiations to be honest.[11] According to the Court, an argument important enough for parties to raise during negotiations requires some proof of accuracy.[12] The Court added that the parties treated the company's ability to pay increased wages as highly relevant.[13] Thus, the *Truitt* Court concluded, the NLRB could reasonably determine that an employer who mechanically repeated a claim of inability to pay without making any effort to substantiate that claim failed to bargain in good faith.[14]

The Court noted, however, that its holding did not automatically extend to every situation in which an employer alleged an inability to pay.[15] The Court explained that the NLRB must evaluate the particular

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[2] 29 U.S.C. § 158(a)(5) (1988).

[3] 29 U.S.C. § 158(d) (1988).

[4] NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152–53, 38 L.R.R.M. 2042, 2043 (1956).

[5] *See, e.g., id.* at 153, 38 L.R.R.M. at 2044; NLRB v. Harvstone Mfg. Corp., 785 F.2d 570, 575, 121 L.R.R.M. 3371, 3375 (7th Cir. 1986).

[6] *See, e.g.*, Facet Enter., Inc. v. NLRB, 907 F.2d 963, 980, 134 L.R.R.M. 2609, 2621 (10th Cir. 1990); Dallas Gen. Drivers v. NLRB, 355 F.2d 842, 845, 61 L.R.R.M. 2065, 2067 (D.C. Cir. 1966).

[7] *Truitt*, 351 U.S. at 153, 38 L.R.R.M. at 2044.

[8] *Id.* at 150, 38 L.R.R.M. at 2042.

[9] *Id.*

[10] *Id.* at 150, 38 L.R.R.M. at 2043.

[11] *Id.* at 152, 38 L.R.R.M. at 2043.

[12] *Truitt*, 351 U.S. at 152–53, 38 L.R.R.M. at 2043.

[13] *Id.* at 152, 38 L.R.R.M. at 2043.

[14] *See id.* at 153, 38 L.R.R.M. at 2043.

[15] *See id.* at 153, 38 L.R.R.M. at 2044.

facts of each case to determine whether the parties have met their statutory obligation to bargain in good faith.[16] The *Truitt* Court thus set forth a universal standard of inquiry to be applied in each disclosure case, rather than a universal obligation to substantiate all claims made during negotiations.[17]

The Federal Courts of Appeals are divided over the extent to which *Truitt* requires employers to disclose financial information to union bargaining representatives.[18] In 1966, in *NLRB v. Western Wirebound Box Co.*, the United States Court of Appeals for the Ninth Circuit held that the *Truitt* disclosure rule is not limited to cases in which the employer alleges a financial inability to pay increased wages.[19] Western Wirebound Box Co. ("Western Wirebound") sought a wage reduction to remain competitive in its industry.[20] Western Wirebound specifically denied an inability to pay and refused to provide the union with financial information.[21] The Ninth Circuit indicated that good faith bargaining requires employers to substantiate relevant claims, those important enough to be presented during negotiations.[22] The Ninth Circuit reasoned that claims of competitive disadvantage and claims of financial inability merit the same analysis.[23] The court concluded, therefore, that Western Wirebound's competitive disadvantage claim required substantiation.[24]

Similarly, in 1966, in *NLRB v. Celotex Corp.*, the United States Court of Appeals for the Fifth Circuit held that *Truitt* could require substantiation of competitive disadvantage claims.[25] Celotex Corporation ("Celotex") sought relief from certain restrictions in the collective bargaining agreement to remain competitive.[26] Celotex specifically denied an inability to pay, insisting that it could pay what it deemed appropriate to pay.[27] Therefore, Celotex asserted, the financial data

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[16] *See id.* at 153–54, 38 L.R.R.M. at 2044.

[17] *See Truitt*, 351 U.S. at 153–54, 38 L.R.R.M. at 2044.

[18] *See, e.g.*, Facet Enter., Inc. v. NLRB, 907 F.2d 963, 980, 134 L.R.R.M. 2609, 2621 (10th Cir. 1990); NLRB v. Harvstone, 785 F.2d 570, 575–76, 121 L.R.R.M. 3371, 3375–76 (7th Cir. 1986); Washington Materials, Inc. v. NLRB, 803 F.2d 1333, 1338, 123 L.R.R.M. 2774, 2778 (4th Cir. 1986); NLRB v. Goodyear Aerospace Corp., 497 F.2d 747, 751, 86 L.R.R.M. 2763, 2766 (6th Cir. 1974); NLRB v. Celotex Corp., 364 F.2d 552, 554, 62 L.R.R.M. 2475, 2477 (5th Cir. 1966); NLRB v. Western Wirebound Box Co., 356 F.2d 88, 90, 61 L.R.R.M. 2218, 2220 (9th Cir. 1966); Dallas Gen. Drivers v. NLRB, 355 F.2d 842, 845, 61 L.R.R.M. 2065, 2067 (D.C. Cir. 1966).

[19] *Western Wirebound Box Co.*, 356 F.2d at 90, 61 L.R.R.M. at 2220.

[20] *Id.* at 89, 61 L.R.R.M. at 2219.

[21] *Id.*

[22] *See id.* at 90–91, 61 L.R.R.M. at 2220.

[23] *See id.*

[24] *See Western Wirebound Box Co.*, 356 F.2d at 91, 61 L.R.R.M. at 2220.

[25] *See Celotex*, 364 F.2d at 554, 62 L.R.R.M. at 2477.

[26] *Id.* at 553, 62 L.R.R.M. at 2476.

[27] *Id.* at 553, 62 L.R.R.M. at 2477.

sought by the union was irrelevant.[28] The court analogized the *Truitt* disclosure rule to the rule governing discovery: information must be disclosed unless it plainly appears irrelevant.[29] Thus, the Fifth Circuit did not distinguish between claims of inability to pay and claims of competitive disadvantage, but sought to determine whether or not the information requested by the union was plainly irrelevant.[30] Accordingly, the court upheld the NLRB finding that Celotex violated its obligation to bargain in good faith by refusing to substantiate its competitive disadvantage claims.[31]

Conversely, in 1966, in *United Fire Proof Warehouse Co. v. NLRB*, the United States Court of Appeals for the Seventh Circuit held that an employer had no obligation to disclose financial information to substantiate a claim of competitive disadvantage.[32] Four companies in a multi-employer bargaining unit claimed that non-union competitors in the industry operated at lower costs than their own.[33] The companies asserted that financial information would not substantiate competitive disadvantage claims.[34] The Seventh Circuit distinguished between claims of inability to pay and claims of unwillingness to meet union demands.[35] The court reasoned that when an employer is unwilling to meet union demands, disclosure of financial information will not provide the union with insight into that employer's resolve.[36] The Seventh Circuit categorized the companies' competitive disadvantage assertions as claims of unwillingness to pay, and therefore held that the employers had no obligation to disclose financial information.[37]

Similarly, in 1988, in *Nielsen Lithographing Co. v. NLRB*, the Seventh Circuit vacated an NLRB finding that an employer must substantiate its competitive disadvantage claims by disclosing financial information to the union.[38] The Nielsen Lithographing Company ("Nielsen") demanded wage cuts to remain competitive in its industry.[39] The Seventh Circuit reasoned that Nielsen stated a subjective

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[28] *See id.* at 554, 62 L.R.R.M. at 2477.

[29] *Id.*

[30] *See Celotex*, 364 F.2d at 554, 62 L.R.R.M. at 2477.

[31] *Id.*

[32] *See* United Fire Proof Warehouse Co. v. NLRB, 356 F.2d 494, 498, 61 L.R.R.M. 2315, 2318 (7th Cir. 1966).

[33] *Id.* at 495, 61 L.R.R.M. at 2315.

[34] *See id.* at 496, 61 L.R.R.M. at 2316.

[35] *See id.* at 498, 61 L.R.R.M. at 2318.

[36] *See id.*

[37] *See United Fire Proof Warehouse*, 356 F.2d at 498, 61 L.R.R.M. at 2318.

[38] *See* Nielsen Lithographing Co. v. NLRB, 854 F.2d 1063, 1067, 129 L.R.R.M. 2367, 2370 (7th Cir. 1988).

[39] *Id.* at 1065, 129 L.R.R.M. at 2368.

desire, not an objective need.[40] Thus, the court reasoned, no existing data could substantiate Nielsen's subjective desire to reduce wages.[41] The *Nielsen* court then remanded the case to the NLRB for a decision consistent with Seventh Circuit authority.[42]

The United States Court of Appeals for the District of Columbia has varied in its interpretations of *Truitt*.[43] In 1966, in *Dallas General Drivers v. NLRB*, the D.C. Circuit upheld an NLRB finding that good faith bargaining did not obligate an employer to substantiate a competitive disadvantage claim.[44] Empire Terminal Warehouse Co. ("Empire") alleged competitive disadvantage in response to the union's request for a wage increase.[45] Empire admitted financial health, but averred a loss of accounts due to an inflated wage scale.[46] The D.C. Circuit noted that Empire claimed competitive disadvantage and not financial inability.[47] The court concluded, therefore, that Empire need not disclose financial information to the union.[48]

In marked contrast, in 1968, in *United Steelworkers of America, Local 5571 v. NLRB*, the D.C. Circuit held that a company must substantiate claims important enough to raise during collective bargaining.[49] Stanley-Artex Windows, Division of the Stanley Works ("Stanley") claimed that it could not grant a wage increase and remain competitive.[50] The D.C. Circuit reasoned that claims of competitive disadvantage are merely the explanation of claims of inability to pay, and are not analytically distinct.[51] The D.C. Circuit stressed that any claim important

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[40] *See id.*

[41] *See id.*

[42] *Id.* at 1067, 129 L.R.R.M. at 2370. On remand, the NLRB found that Nielsen alleged competitive disadvantage, and therefore did not fail to bargain in good faith by refusing to substantiate its claim. *See* Graphic Communications Int'l Union, Local 508 v. NLRB and Nielsen Lithographing Co., 977 F.2d 1168, 1170–71 (7th Cir. 1992). The Union then filed a petition for review. *See id.* at 1168. In denying the petition for review, the Seventh Circuit reasoned that the requested information would not substantiate Nielsen's competitive disadvantage claim. *See id.* at 1170. Therefore, according to the Seventh Circuit, the Company had no obligation to disclose. *See id.* at 1170–71.

[43] *See* United Steelworkers of Am., Local 5571 v. NLRB, 401 F.2d 434, 436, 69 L.R.R.M. 2196, 2198 (D.C. Cir. 1968); Dallas Gen. Drivers v. NLRB, 355 F.2d 842, 845, 61 L.R.R.M. 2065, 2067 (D.C. Cir. 1966).

[44] *See Dallas Gen. Drivers*, 355 F.2d at 845, 61 L.R.R.M. at 2067.

[45] *See id.* at 844, 61 L.R.R.M. at 2066.

[46] *See* Empire Terminal Warehouse Co. and Dallas Gen. Drivers, Local Union 745, 151 N.L.R.B. 1359, 1367, 58 L.R.R.M. 1589, 1589–90 (1965).

[47] *See Dallas Gen. Drivers*, 355 F.2d at 845, 61 L.R.R.M. at 2067.

[48] *See id.*

[49] *Local 5571*, 401 F.2d at 436, 69 L.R.R.M. at 2197.

[50] *Id.*

[51] *See id.* at 436, 69 L.R.R.M. at 2198.

enough to be raised during collective bargaining must be substantiated.[52] Thus, the court upheld the NLRB finding that Stanley must disclose financial data to the union.[53]

During the *Survey* year, in *United Steelworkers of America, Local 14534 v. NLRB*, the D.C. Circuit upheld an NLRB finding that an employer's claim of competitive disadvantage did not require substantiation.[54] Concrete Pipe and Products Corp.—Syracuse Division ("Concrete Pipe" or "the Company") sought wage and benefit concessions to be competitive in its market.[55] The court recognized that the NLRB finding contradicted previous Board decisions that the court had enforced.[56] The court determined, however, that the NLRB may alter its interpretation of substantive law, provided that the new interpretation does not conflict with the NLRA and is accompanied by reasoned analysis.[57] Satisfied with the NLRB's new interpretation and explanation, the D.C. Circuit upheld the NLRB's shift in position regarding the scope of the *Truitt* disclosure rules.[58]

Until 1987, Concrete Pipe enjoyed a thirty-year collective bargaining relationship with its maintenance and productions employees union ("Union").[59] During the first negotiation session of 1987, the Company president announced that to be competitive, the Company must lower wage rates and benefits.[60] Concrete Pipe then proposed a 30% reduction in wages.[61] The Union representative responded that the Union would make concessions if the Company's books showed a need.[62] Concrete Pipe denied the Union's request, citing a Company policy against disclosing financial data.[63] Throughout subsequent negotiations, Concrete Pipe steadfastly refused to disclose financial information to the Union.[64]

The Union filed a charge with the NLRB, alleging that Concrete Pipe had failed to bargain in good faith by refusing to disclose its

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[52] *See id.* at 436, 69 L.R.R.M. at 2197. The D.C. Circuit also noted that the Company put ability to pay at issue, which triggered an obligation to disclose. *Id.*

[53] *See id.* at 436, 69 L.R.R.M. at 2197–98.

[54] United Steelworkers of Am., Local 14534 v. NLRB, 983 F.2d 240, 245, 142 L.R.R.M. 2177, 2180 (D.C. Cir. 1993).

[55] *Local 14534*, 983 F.2d at 242, 142 L.R.R.M. at 2178.

[56] *Id.* at 244, 142 L.R.R.M. at 2180.

[57] *Id.*

[58] *Id.* at 245, 142 L.R.R.M. at 2180.

[59] *Id.* at 242, 142 L.R.R.M. at 2178.

[60] *Local 14534*, 983 F.2d at 242, 142 L.R.R.M. at 2178.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *See id.*

financial information to the Union.[65] The Administrative Law Judge ("ALJ") found that Concrete Pipe had failed to bargain in good faith.[66] The ALJ reasoned that the Company's bargaining claims were central to the parties' negotiations and, thus, highly relevant.[67] The ALJ concluded that the Company's refusal to substantiate its claim of competitive disadvantage preordained the failure of the negotiations.[68]

Concrete Pipe filed exceptions to the ALJ's decision with the NLRB.[69] Reversing the ALJ in part, the NLRB held that Concrete Pipe had no obligation to provide financial data.[70] The majority, however, did not base its holding on *Truitt*.[71] Instead, the majority reasoned that an employer's desire to bring its wages in line with competitors is simply a legitimate bargaining goal.[72] Thus, the majority concluded, the ALJ could not reasonably view Concrete Pipe's desire to reduce its wages as a deliberate attempt to frustrate negotiations.[73]

In a concurring opinion, however, NLRB Chairman Stephens emphasized that, under *Truitt*, Concrete Pipe had no obligation to disclose financial information to the Union.[74] Stephens reasoned that Concrete Pipe's claim did not raise the issue of the Company's financial health.[75] Therefore, Stephens concluded, the Company never made a claim that financial records could verify.[76] According to

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[65] *See id.* at 243, 142 L.R.R.M. at 2178. The Union subsequently filed an additional charge, alleging that Concrete Pipe and Products unlawfully refused to allow its striking employees to return to work after they had made an unconditional offer to return, in violation of § 8(a)(3) of the NLRA. *Id.* The NLRB ruled in favor of the Union on this charge. *Id.* at 243, 142 L.R.R.M. at 2179.

[66] *See* Concrete Pipe and Prod. Corp.—Syracuse Div. and United Steelworkers of Am., Local 14534, 305 N.L.R.B. 152, 171, 138 L.R.R.M. 1185, 1185 (1991). In addition, the ALJ found that Concrete Pipe's unfair labor practices had caused the strike, and that it had discriminated against its employees on the basis of Union membership by refusing to reinstate them after they unconditionally offered to return to work. *Id.*

[67] *See id.* at 153, 138 L.R.R.M. at 1186.

[68] *See id.*

[69] See *id.* at 152, 138 L.R.R.M. at 1185.

[70] *See id.* at 152, 138 L.R.R.M. at 1186. The NLRB also reversed the ALJ on the nature of the strike which followed negotiations breakdown, holding that it was an economic strike, and not an unfair labor practice strike, since the Company did not engage in any unfair labor practice. *See id.* After several months, the strikers unconditionally offered to return to work. *See id.* The NLRB upheld the ALJ finding that returning economic strikers are generally entitled to full reinstatement, and thus that Concrete Pipe was obligated to rehire the strikers after their unconditional offer. *See id.* at 154, 138 L.R.R.M. at 1187.

[71] *See Concrete Pipe*, 305 N.L.R.B. at 153, 138 L.R.R.M. at 1186.

[72] *Id.*

[73] *See id.* at 153, 138 L.R.R.M. at 1186–87.

[74] *Id.* at 155, 138 L.R.R.M. at 1187.

[75] *Id.* at 155, 138 L.R.R.M. at 1188.

[76] *See id.* at 155, 138 L.R.R.M. at 1187.

Stephens, Concrete Pipe's allegations made relevant nothing more than the factual issue of the Company's competitive disadvantage.[77] Thus, Stephens concluded that, under *Truitt*, Concrete Pipe's financial records were irrelevant to the negotiations.[78]

The D.C. Circuit affirmed the NLRB decision, holding, under *Truitt*, that substantial evidence could support the NLRB finding that the Company had no obligation to disclose financial information to the Union.[79] First, the court recognized that good faith bargaining requires employers to provide union representatives with information relevant to the proper performance of representatives' duties.[80] According to the court, however, *Truitt* indicates that financial information is not presumed relevant to the performance of bargaining representatives' duties.[81] Instead, the court continued, *Truitt* requires courts to determine the relevancy of financial information on a case by case basis.[82] The court indicated that the NLRB must determine whether the employer has claimed financial inability or a competitive disadvantage in each case.[83] According to the court, a company must disclose financial information only when it asserts financial inability.[84]

The court then noted that in prior decisions enforced by the D.C. Circuit, the NLRB required employers to substantiate claims of competitive disadvantage under *Truitt*.[85] According to the court, however, circuit courts generally defer to the NLRB due to its expertise.[86] Thus, the D.C. Circuit reasoned that the NLRB may alter its interpretation of substantive law provided that: (1) the new interpretation does not conflict with the NLRA, and (2) the NLRB supplies a reasoned analysis for its new interpretation.[87]

The D.C. Circuit then determined that the Board's new interpretation of the *Truitt* disclosure rules met that two part standard.[88] Without explanation, the court concluded that the new interpretation did not conflict with the broad terms of the NLRA.[89] The court then noted

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[77] *Concrete Pipe*, 305 N.L.R.B. at 155, 138 L.R.R.M. at 1188.

[78] *See id.* at 155, 138 L.R.R.M. at 1187–88.

[79] *See* United Steelworkers of Am., Local 14534 v. NLRB, 983 F.2d 240, 245, 142 L.R.R.M. 2177, 2180 (D.C. Cir. 1993).

[80] *Id.* at 243, 142 L.R.R.M. at 2179.

[81] *Id.*

[82] *See id.* at 243–44, 142 L.R.R.M. at 2179.

[83] *Id.*

[84] *Local 14534*, 983 F.2d at 243–44, 142 L.R.R.M. at 2179.

[85] *Id.* at 244, 142 L.R.R.M. at 2180.

[86] *See id.* at 244, 142 L.R.R.M. at 2179.

[87] *See id.* at 244, 142 L.R.R.M. at 2180.

[88] *See id.* at 245, 142 L.R.R.M. at 2180.

[89] *See Local 14534*, 983 F.2d at 245, 142 L.R.R.M. at 2180.

that the NLRB, in *Local 14534*, supplied no reasoned analysis for its change in opinion.[90] The court recognized, however, that, in *Nielsen Lithographing*, the NLRB had supplied the requisite detailed explanation for its new analysis of competitive disadvantage claims.[91] The D.C. Circuit concluded that the NLRB's *Nielsen Lithographing* decision provided the required detailed explanation.[92] Accordingly, the court upheld the NLRB decision in favor of Concrete Pipe.[93]

The D.C. Circuit's holding in *Local 14534*, that a claim of competitive disadvantage did not trigger an employer obligation to substantiate, follows a recent judicial trend holding that *Truitt* does not require substantiation of competitive disadvantage claims.[94] The D.C. Circuit, however, has not affirmatively approved this narrow interpretation of *Truitt*.[95] The decision in *Local 14534* speaks more about deference to reasonable administrative agency findings than about the proper interpretation of *Truitt*.[96] Ultimately, the D.C. Circuit, irrespective of its own opinion, upheld the NLRB decision on the technical grounds that the NLRA could be read to allow the NLRB's shift in position, and that substantial evidence supported that shift.[97]

Thus, the D.C. Circuit's reasoning in *Local 14534* could apply equally had the NLRB found that competitive disadvantage claims were equivalent to financial inability claims. Under *Local 14534*, the NLRB may come to any decision as long as the decision comports with the NLRA and the NLRB provides a reasoned explanation.[98] Implicitly, however, the D.C. Circuit did approve of the NLRB's new approach to financial disclosure obligations. Rather than apply its own standard rigidly, the court read the NLRA broadly to accommodate the NLRB's new position, and waived the requirement of a reasoned explanation.[99]

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[90] *Id.*

[91] *See id.* (citing Nielsen Lithographing Co. v. NLRB, 854 F.2d 1063, 1067, 129 L.R.R.M. 2367, 2370 (7th Cir. 1988)). The ALJ's *Nielsen Lithographing* decision adopted by the NLRB, states that common sense dictates that when an employer does not claim financial inability, and simply chooses not to pay more, further financial data is irrelevant. *See* Nielsen Lithographing Co. and Graphic Communications Int'l Union, Local 508, 279 N.L.R.B. 877, 878 (1986). Absent a claim of financial inability, the union has no right to inspect the employer's books. *See id.*

[92] *See Local 14534*, 983 F.2d at 245, 142 L.R.R.M. at 2180.

[93] *See id.*

[94] *See, e.g.*, Facet Enter., Inc. v. NLRB, 907 F.2d 963, 980, 134 L.R.R.M. 2609, 2621 (10th Cir. 1990); Nielsen Lithographing Co. v. NLRB, 854 F.2d 1063, 1065, 129 L.R.R.M. 2367, 2368 (7th Cir. 1988); Washington Materials, Inc. v. NLRB, 803 F.2d 1333, 1338, 123 L.R.R.M. 2774, 2778 (4th Cir. 1986); NLRB v. Harvstone, 785 F.2d 570, 576, 121 L.R.R.M. 3371, 3375 (7th Cir. 1986).

[95] *See Local 14534*, 983 F.2d at 244, 142 L.R.R.M. at 2179–80.

[96] *Id.*

[97] *See id.* at 245, 142 L.R.R.M. at 2180.

[98] *See id.*

[99] *See id.*

For practical purposes, the decision in *Local 14534* has major significance for parties in collective bargaining. First, the D.C. Circuit indicated that it was joining with other circuits that have found the NLRB's new interpretation of *Truitt* permissible, implicitly approving of the NLRB shift.[100] Second, the D.C. Circuit remains highly influential among the circuits, particularly in labor law.[101] Thus, *Local 14534* will likely persuade other circuits, and perhaps the Supreme Court, to uphold the NLRB's restrictive interpretation of the *Truitt* rule. Even though the D.C. Circuit did not independently endorse the new NLRB reading of *Truitt, Local 14534* tips the scales strongly in favor of a general trend toward restrictive disclosure rules.[102]

Furthermore, the *Local 14534* decision may also affect the balance of power between employers and unions in collective bargaining negotiations. The strength of the D.C. Circuit's authority may dissuade unions from challenging employers who refuse to substantiate any claim that is not clearly one of financial inability. Further, alert employers will avoid financial inability claims when refusing to meet union demands. Thus, *Local 14534* further enhances employers' collective bargaining positions because the NLRB and circuit courts will not require substantiation of most claims.

Finally, the restrictive financial information disclosure rule applied in *Local 14534* derives directly from the *Truitt* reasoning, and is thus preferable to the prior, less restrictive application. The *Truitt* Court emphasized that claims both parties consider highly relevant to collective bargaining require some substantiation.[103] Yet the *Truitt* Court refused to require disclosure in all cases involving financial inability.[104] Thus, the *Truitt* Court gave future triers of fact discretion in requiring employers to substantiate claims made during collective bargaining.[105]

By claiming financial inability, an employer states an objective fact a union representative can verify by examining the employer's financial records.[106] The financial information, therefore, is highly relevant

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[100] *See Local 14534*, 983 F.2d at 245, 142 L.R.R.M. at 2180.

[101] *See, e.g.*, 29 U.S.C. § 160(f) (1988) (NLRA grants D.C. Circuit jurisdiction to review all N.L.R.B. decisions); *see also*, F.T.C. v. Stanley H. Kaplan Educ. Ctr. Ltd., 433 F. Supp. 989, 993 (D. Mass. 1977) (court notes that views of the D.C. Circuit regarding administrative matters carry great weight).

[102] *See, e.g.*, *Facet Enter.*, 907 F.2d at 980, 134 L.R.R.M. at 2621; *Nielsen Lithographing*, 854 F.2d at 1065, 129 L.R.R.M. at 2368; *Washington Materials*, 803 F.2d at 1338, 123 L.R.R.M. at 2778; *Harvstone*, 785 F.2d at 576, 121 L.R.R.M. at 3376.

[103] *See* NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152–53, 38 L.R.R.M. 2042, 2043 (1956).

[104] *See id.* at 153, 38 L.R.R.M. at 2044.

[105] *See id.*

[106] *See* Concrete Pipe and Prod. Corp.—Syracuse Div. and United Steelworkers of Am., Local 14534, 305 N.L.R.B. 152, 155, 138 L.R.R.M. 1185, 1187–88 (1991).

to the negotiations. Conversely, by claiming unwillingness to pay, an employer merely states a subjective resolve.[107] Although the union may find additional financial data informative and useful, that information cannot verify an employer's subjective state of mind, and is thus irrelevant to the negotiations.[108] A claim of competitive disadvantage represents an employer's subjective perception of its position in an industry, and, therefore, should be analyzed as an unwillingness rather than an inability to meet union demands. While external information, such as competitors' wages or benefits levels may verify a claim of competitive disadvantage, internal financial information will not.[109] Thus, the D.C. Circuit's holding in *Local 14534* allows the NLRB to supplant its prior interpretation of *Truitt* with a new, restrictive approach that is consistent with the *Truitt* reasoning.

In conclusion, in *Local 14534*, the D.C. Circuit approved an NLRB holding that section 8(a)(5) of the NLRA does not require employers to substantiate their claims of competitive disadvantage. Concrete Pipe and Products did not fail to bargain in good faith by refusing to substantiate its claim of competitive disadvantage in response to union demands for wage increases. Although the NLRB adopted a position on financial disclosure inconsistent with prior NLRB decisions, the D.C. Circuit upheld the decision because it comported with the NLRA and was accompanied by a reasoned explanation. The D.C. Circuit joined other circuits which do not require the substantiation of competitive disadvantage claims under *Truitt*. Although this case is primarily about deference to NLRB findings, it ultimately has a significant impact on future labor—management collective bargaining negotiations.

E. **Rights of Employee Members of Outside Political Groups to Distribute Literature on the Employer's Property:* NLRB v. Motorola[1]

Section 7 of the National Labor Relations Act ("NLRA" or "Act") provides that employees have the right to engage in concerted activities for the purposes of mutual aid or protection.[2] Section 8(a)(1) of the

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[107] *See, e.g.*, United Fire Proof Warehouse Co. v. NLRB, 356 F.2d 494, 498, 61 L.R.R.M. 2315, 2318 (7th Cir. 1966); The Nielsen Lithographing Co. and Graphic Communications Int'l Union, Local 508, 279 N.L.R.B. 877, 879 (1986).

[108] *See* United Fireproof Warehouse Co. v. NLRB, 356 F.2d 494, 498, 61 L.R.R.M. 2315, 2318 (7th Cir. 1966).

[109] *See Concrete Pipe and Prod.*, 305 N.L.R.B. at 155, 138 L.R.R.M. at 1187–88.

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[1] 991 F.2d 278, 143 L.R.R.M. 2369 (5th Cir. 1993).

[2] 29 U.S.C. § 157 (1988). Section 7 of the NLRA provides in relevant part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collec-

Act implements these rights by providing that an employer's interference with employees' section 7 rights constitutes an unfair labor practice.[3] Over time, courts have held that section 7 protects certain employee activities, such as the right of employees to form independent groups or associations for mutual aid[4] and the right to appeal to legislators to protect employees' interests.[5] The degree of section 7 protection for employee distribution of political literature on an employer's premises, however, is less certain.[6]

In 1975, in *Ford Motor Co.*, the National Labor Relations Board ("NLRB" or "Board") ruled that Ford's refusal to allow its employees to distribute a newsletter urging workers to reject Democratic and Republican candidates in the 1974 congressional elections did not infringe upon the worker's section 7 rights.[7] The Board reasoned that the newsletter was "wholly political propaganda" and did not relate to employees' interests and problems as employees.[8] Thus, the Board concluded that the "mutual aid or protection" clause of the NLRA did not protect the employees' distribution of these leaflets on company property.[9]

The company refused to permit an employee member of the union's militant subgroup to distribute a newsletter on company property during nonwork time.[10] The newsletter urged employees not to support the traditional parties and candidates in the 1974 congressional elections, but instead to help create an independent workers' party.[11] The employee filed a complaint with the Board, alleging that the company's enforcement of a no-distribution rule violated section 8(a)(1) of the NLRA by unlawfully limiting employees' exercise of their section 7 rights.[12]

The NLRB affirmed the Administrative Law Judge's ("ALJ") ruling that the company's refusal to permit distribution of this edition of the

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tively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." *Id.*

[3] 29 U.S.C. § 158(a)(1) (1988). Section 8(a)(1) of the NLRA provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of the rights guaranteed by § 7 of the Act. *Id.*

[4] *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798, 16 L.R.R.M. 620, 623 (1945).

[5] *See, e.g.*, Kaiser Engineers v. NLRB, 538 F.2d 1379, 1385, 92 L.R.R.M. 3153, 3157 (9th Cir. 1976).

[6] *See, e.g., Motorola*, 991 F.2d at 278, 143 L.R.R.M. at 2369.

[7] *See* 221 N.L.R.B. 663, 663, 666 (1975), *enforced*, 546 F.2d 418 (3rd Cir. 1976).

[8] *Id.* at 666.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 664, 666.

[12] *Ford Motor Co.*, 221 N.L.R.B. at 663.

newsletter on its premises did not violate the NLRA.[13] The ALJ reasoned that this particular newsletter did not involve employees' problems and concerns as employees, and thus the distribution of this political tract fell outside of the protection of section 7.[14] While recognizing that the election of *any* political candidate could ultimately affect the workers' employment conditions, the ALJ determined that this concern was sufficiently removed from the employees' interests to permit the employer's distribution ban on company property.[15] Thus, the Board affirmed the ALJ's conclusion that the newsletter fell outside of the protection afforded by section 7.[16]

In 1978, in *Eastex, Inc. v. NLRB*, the United States Supreme Court held that the section 7 "mutual aid or protection" clause protected employee distribution of a newsletter containing sections which could be viewed as "political."[17] Eastex refused to permit employee union members to distribute, on company property during nonworking time, a newsletter containing sections that criticized both a proposed "right-to-work" provision for the Texas constitution and a Presidential veto of an increase in the federal minimum wage.[18] The Court reasoned that these sections of the newsletter bore a sufficient relation to the workers' interests as employees as to fall within the guarantee of section 7.[19] Thus, the Court concluded that the ban on distribution of the literature interfered with employee rights guaranteed by section 7 of the NLRA.[20]

In *Eastex*, employee union officials sought to increase employee support for the union and to recruit new members prior to the upcoming contract negotiations with the company by distributing a newsletter to the workers.[21] The newsletter contained four sections, the first and last of which generally urged employee support and participation

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[13] *Id.* at 663, 666.

[14] *See id.* at 666.

[15] *Id.*

[16] *See id.* at 663, 666. It should be noted that this case also involved a newsletter entitled "The Militant Autoworker," dated September 13, 1974. *Id.* at 666. The main topic of the newsletter was the issue of forced overtime at the employer's plant. *Id.* Once again, company officials refused to give the employee permission to distribute the letter on the employer's premises. *Id.* The Board affirmed the ALJ's findings that this September 13 newsletter was protected under § 7 of the NLRA. *Id.* The ALJ reasoned that the issue of forced overtime at the plant was certainly a matter which fell within the range of § 7 protection. *Id.* The company's ban on the literature's distribution thus constituted a violation of § 8(a)(1) of the NLRA. *Id.*

[17] 437 U.S. 556, 570 & n.20, 98 L.R.R.M. 2717, 2722 & n.20 (1978).

[18] *Id.* at 559–61, 98 L.R.R.M. at 2718.

[19] *See id.* at 569, 98 L.R.R.M. at 2721.

[20] *See id.* at 570, 98 L.R.R.M. at 2722.

[21] *Id.* at 559, 98 L.R.R.M. at 2718.

in the union.[22] The newsletter's second section discussed the possible incorporation of a "right-to-work" provision into a revised Texas constitution and how this would weaken unions and provide management with bargaining advantages, and encouraged employees to write to their legislator to oppose this measure.[23] The newsletter's third section criticized a recent Presidential veto of a bill to increase the federal minimum wage, and urged readers to register to vote in order to elect politicians supporting policies favorable to labor.[24] On two different occasions, the employer refused to give employees permission to distribute the newsletter on company property.[25]

The union filed an unfair labor practice charge with the Board, alleging that the company's two refusals interfered with the employees' exercise of section 7 rights, and, thus, violated section 8(a)(1) of the NLRA.[26] An ALJ ruled that, even though all four of the newsletter's sections did not directly bear on the relationship between the union and the company, distribution of the material constituted protected activity under section 7.[27] The NLRB affirmed the ALJ's ruling, findings, and conclusions.[28] The United States Court of Appeals for the Fifth Circuit enforced the Board's order, reasoning that section 7 protected literature that discusses subjects reasonably related to the workers' jobs or to their condition as employees.[29]

The Supreme Court affirmed the Fifth Circuit's decision, holding that section 7 protected the distribution of both the second and third sections of the newsletter.[30] The Court rejected the company's arguments that the distribution received no section 7 protection simply because the employees' activity did not relate to a specific dispute between themselves and the company over an issue which the em-

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[22] *Eastex*, 437 U.S. at 559, 98 L.R.R.M. at 2718.

[23] *Id.*

[24] *See id.* at 559–60, 98 L.R.R.M. at 2718.

[25] *Id.* at 560–61, 98 L.R.R.M. at 2718. As a justification for its decision, the company told the employees that the union had other ways to communicate with the workers. *See id.* at 561, 98 L.R.R.M. at 2718.

[26] *Eastex*, 437 U.S. at 561, 98 L.R.R.M. at 2718.

[27] *Id.*

[28] 215 N.L.R.B. 271, 271, 88 L.R.R.M. 1475, 1475 (1974).

[29] *See Eastex*, 550 F.2d 198, 199, 203, 94 L.R.R.M. 3201, 3201, 3204 (5th Cir. 1977).

[30] *Eastex*, 437 U.S. at 570, 576, 98 L.R.R.M. at 2722, 2724. The Court noted that this case involved two distinct questions. *Id.* at 563, 98 L.R.R.M. at 2719. First, the Court had to determine whether or not the newsletter was the kind of concerted activity which §§ 7 and 8(a)(1) of the NLRA protected from employer interference. *Id.* Because the Court answered this question affirmatively, it then proceeded to consider the second question; namely, whether the fact that the distribution takes place on company property gives rise to a countervailing interest which outweighs the exercise of § 7 rights in that location. *See id.* at 563, 570, 98 L.R.R.M. at 2719, 2722.

ployer had the right or power to affect.[31] The Court observed that the company had misconceived the reach of the term "employee" in section 7 to refer only to employees of a particular employer.[32] Instead, the Court noted that section 2(3) did not limit, in this way, those "employees" who may engage in concerted activities for "mutual aid or protection."[33] The Court also observed that this broader definition of the term "employees" fulfilled the Act's intent by protecting employees who engaged in activities supporting other employers' workers.[34]

The Court also rejected Eastex's contention that workers lose their section 7 protection when they turn to channels outside the immediate employer-employee relationship to improve their conditions of employment.[35] The Court reasoned that Congress' inclusion in section 7 of the broader "mutual aid or protection" language, in addition to the narrower purposes of "self-organization" and "collective bargaining," indicated the legislature's awareness that labor's cause often is furthered outside of the immediate employer-employee context.[36] Furthermore, the Court observed that section 7 protected employees who turn to administrative and judicial forums or appeal to legislators to protect their interests as employees.[37] The Court also noted that leaving these kinds of legitimate activities entirely unprotected would frustrate the policy underlying the NLRA because employees' ability to work together to improve employment conditions would be severely hampered.[38]

The *Eastex* Court did assume, however, that at some point, the relationship of some forms of concerted activity to employees' interests as employees becomes so attenuated that an activity could not fairly be deemed to fall within the protective ambit of the "mutual aid or protection" clause.[39] The Court emphasized that the Board had the responsibility of demarcating the boundaries of this clause on a case-by-case basis.[40] Thus, the Court assumed the existence of a "point of

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[31] *Id.* at 563–64, 98 L.R.R.M. at 2719–20.

[32] *Id.* at 564, 98 L.R.R.M. at 2719–20.

[33] *Id.* at 564, 98 L.R.R.M. at 2720.

[34] See id.

[35] *Eastex*, 437 U.S. at 565, 98 L.R.R.M. at 2720.

[36] *See id.*

[37] *Id.* at 565–66, 98 L.R.R.M. at 2720.

[38] *See id.* at 566–67, 98 L.R.R.M. at 2720.

[39] *Id.* at 567–68, 98 L.R.R.M. at 2721.

[40] *Eastex*, 437 U.S. at 568, 98 L.R.R.M. at 2721. The Court stated that in order to decide this particular case, "it is enough to determine whether the Board erred in holding that distribution of the second and third sections of the newsletter is for the purpose of 'mutual aid or protection.'" *Id.*

attenuation" beyond which activity bearing a less immediate relationship to employees' interests as employees would remain unprotected by section 7.[41]

Finally, the Court rejected the company's contention that section 7 did not afford protection to the advancement of the union's "political" views on the right-to-work and minimum wage issues.[42] Noting that one could view almost any issue as political, the Court reasoned that removing conduct or speech from the Act's protection simply by labelling it "political" renders the "mutual aid or protection" clause impotent.[43] The Court posited, however, that some types of activity could be so completely political, or so remotely connected to employees' concerns as workers, that such activity would remain unprotected under section 7.[44] The Court stressed that this determination more properly deserved case-by-case consideration.[45] Thus, the Court held that section 7 protected the employees' distribution of the newsletter.[46]

In 1981, in *Local 174, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. NLRB*, the United States Court of Appeals for the District of Columbia Circuit

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The Supreme Court determined that the Board had not erred in its finding that the "right-to-work" section of the newsletter bore such a relationship to the employees' interests as to fall within the "mutual aid or protection" clause. *Id.* at 569, 98 L.R.R.M. at 2721. The Court accepted the Board's reasoning that this issue could affect employees by weakening unions and improving the position of management in contract negotiations. *See id.* The Court also ruled that the Board had acted within the proper range of its discretion in its ruling that the minimum wage section of the newsletter was protected, for the general wage level is an issue of immediate concern to all employees. *See id.* at 569–70, 98 L.R.R.M. at 2721–22. Thus, the Court did not reverse the Board's conclusion that the newsletter's call for workers to register to vote to elect persons friendly to labor could be fairly described as falling within § 7 as a protected activity. *See Eastex*, 437 U.S. at 570, 98 L.R.R.M. at 2722. Thus, the Court ruled that § 7 protected the distribution of the second and third sections of the newsletter. *Id.*

Because the Court found that employee distribution of this newsletter was protected activity under § 7, it proceeded to the question of whether the Board erred in its holding that Eastex employees may distribute the letter in nonworking areas of the plant during nonworking time. *See id.* The Court held that the NLRB did not err in applying the rule of *Republic Aviation* to this case, which prohibits an employer from preventing employees from distributing union organizational material in nonworking time, unless the employer can demonstrate that the ban is necessary in order to maintain plant production or discipline. *See id.* at 570–71, 575, 576, 98 L.R.R.M. at 2722, 2724. *See generally* Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793, 16 L.R.R.M. 620 (1945). The Supreme Court confined its holding to the facts of this case, however, and in dicta it stated that it need not go so far as to hold that the *Republic Aviation* rule is properly applied to every distribution on company grounds. *See Eastex*, 437 U.S. at 574–75, 98 L.R.R.M. at 2723–24. The Court reasoned that this area of law was new territory for the Board, one not in need of a hastily-adopted, categorical formula. *Id.*

[41] *Eastex*, 437 U.S. at 567–68, 98 L.R.R.M. at 2721.

[42] *See id.* at 570 & n.20, 98 L.R.R.M. at 2722 & n.20.

[43] *See id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 570, 98 L.R.R.M. at 2722.

utilized this "point of attenuation" when it held that an employer did not commit an unfair labor practice by refusing to permit employee union members to distribute pre-election leaflets on company grounds.[47] The employees sought to hand out a leaflet urging workers to protect their collective-bargaining rights by voting for union-endorsed candidates for various statewide offices.[48] The D.C. Circuit reasoned that the leaflet did not educate the employees about political conditions relevant to their working conditions, but instead merely encouraged workers to vote for specific candidates.[49] Thus, the court held the link between the leaflet's distribution and the employees' interests to be sufficiently attenuated that section 7 did not protect the activity.[50]

Employees at the company sought to distribute leaflets which identified and endorsed, by name and photograph, those candidates for Governor, U.S. Senator, and State Supreme Court Justice whom the union believed to be familiar with and committed to workers' needs.[51] When the company refused to give employee union representatives permission to distribute the leaflet in nonworking areas of the plant during nonworking time, the union filed a complaint with the Board, alleging that the company had committed an unfair labor practice by interfering with the employees' right under section 7 of the NLRA.[52] The NLRB held that the leaflets the workers sought to distribute were purely political tracts, and hence the company's refusal to allow their distribution on its premises did not constitute a violation of the Act.[53] In its reasoning, the Board stressed the *Eastex* Court's observation that the "mutual aid or protection" clause should be interpreted with regard to the relationship between the workers' concerted activity and the improvement of their working conditions.[54] The NLRB concluded, therefore, that because the leaflet did not relate sufficiently to the workers' concerns as employees, the company had not committed an unfair labor practice.[55]

In its review of the Board's decision, the D.C. Circuit concluded that this case reached the "point of attenuation" posited in *Eastex*, and, thus, section 7 did not protect the employees' distribution of the

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[47] *See* 645 F.2d 1151, 1152, 1154, 106 L.R.R.M. 2561, 2561, 2563 (D.C. Cir. 1981).
[48] *Id.* at 1152, 106 L.R.R.M. at 2561.
[49] *Id.* at 1154, 106 L.R.R.M. at 2563.
[50] *See id.* at 1152, 1154, 1155, 106 L.R.R.M. at 2561, 2563.
[51] *Id.* at 1152, 106 L.R.R.M. at 2561.
[52] *See* Firestone Steel Prod. Co., 244 N.L.R.B. 826, 826, 102 L.R.R.M. 1172, 1172 (1979).
[53] *Id.* at 826–27, 102 L.R.R.M. at 1172.
[54] *See id.* at 826, 102 L.R.R.M. at 1172.
[55] *Id.* at 827, 102 L.R.R.M. at 1172.

leaflets on company property.[56] The court noted that, unlike the newsletter in *Eastex*, which the employees sought to distribute even though no election was imminent, the leaflet in *Local 174* merely encouraged workers to vote for the four candidates endorsed by the union.[57] Moreover, the court observed that, unlike the *Eastex* newsletter's discussions of issues of immediate concern to the workers, *Local 174*'s pamphlet did not aim to educate the employees on issues relevant to their working conditions.[58] Accordingly, the court agreed with the Board that the relationship between the distribution and the workers' interests as employees was sufficiently attenuated to warrant a ruling that section 7 did not protect that activity.[59]

During the *Survey* year, in *NLRB v. Motorola, Inc.*, the United States Court of Appeals for the Fifth Circuit held that employees acting as members of outside political organizations cannot demand the same section 7 rights as workers engaged in self-organization, collective bargaining, or in self-representation in disputes with their employer, merely because the organization focused on a workplace issue.[60] Members of an outside organization supporting a proposed anti-drug testing ordinance sought permission from the company to distribute organizational literature on the employer's premises.[61] Relying on *Eastex*, the court emphasized that the members of the outside organization neither represented the company's employees nor had the direct goal of changing the company's policies.[62] Thus, the court concluded that employee members of outside political organizations do not enjoy rights under section 7 to distribute their literature on employers' premises.[63]

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[56] *See Local 174*, 645 F.2d at 1154, 1155, 106 L.R.R.M. at 2563.

[57] *See id.* at 1154, 106 L.R.R.M. at 2563.

[58] *Id.*

[59] *See id.* at 1154, 1155, 106 L.R.R.M. at 2563. Furthermore, the court of appeals rejected the Union's argument that the Board's case-by-case approach amounted to a "we know it when we see it" approach which would leave employers and employees without sufficient guidelines to plan their future conduct. *See id.* The court noted, however, that the NLRB's brief to the court indicated that the Board was attempting to place union "political" communications along a continuum, with literature aimed primarily at inducing votes for particular candidates on one end, and material aimed principally at educating employees on political issues which may affect their working conditions on the other. *Id.* The court of appeals determined that this approach was consistent with the *Eastex* Court's observation that § 7 protection "may depend upon the object or context of the activity." *Id.*; *see also Eastex, Inc. v. N.L.R.B.* 437 U.S. 556, 567–68 & n.18, 98 L.R.R.M. 2217, 2721 & n.18 (1978). While both the court of appeals and the Board realized that cases which fall in the middle of this continuum would present close questions as to protected status, the leaflet in *Local 174* did not present such an instance. *Local 174*, 645 F.2d at 1155, 106 L.R.R.M. at 2563.

[60] 991 F.2d 278, 285, 143 L.R.R.M. 2369, 2374. (5th Cir. 1993).

[61] *See id.* at 279, 280–81, 143 L.R.R.M. at 2370–71.

[62] *See id.* at 285, 143 L.R.R.M. at 2374.

[63] *See id.*

In early 1990, company officials at Motorola began to discuss implementing a mandatory random drug testing policy at its Oak Hill plant.[64] Upon learning of this possibility, Motorola workers opposed to the plan discussed how to coordinate their opposition efforts.[65] Three Motorola employees joined an organization called "Citizens Advocating the Protection of Privacy" ("CAPP"), a local non-profit association which opposed mandatory drug testing by government or corporate entities, and assumed positions on the organization's planning committee.[66]

In May 1990, to protest the possible implementation of the drug testing program, nearly 100 Motorola workers held a work slowdown in the company cafeteria by prolonging their coffee break.[67] The company, however, took no disciplinary measures against these workers.[68] Later that month, management met with certain employees, including one who had recently joined CAPP, to inform them that the company would indeed announce the adoption of a mandatory drug testing policy.[69] The personnel manager also told the employees, however, that workers opposed to the new policy could freely support the passage of a city ordinance prohibiting employers from conducting such testing on their employees.[70] On June 1, 1990, the company officially announced that mandatory random drug testing would begin on January 1, 1991, and any worker who refused to submit to a test would be subject to discharge.[71]

Days prior to the formal announcement of the policy, an employee member of CAPP met with company officials to seek permission to post notices on bulletin boards and to distribute literature on the premises.[72] The employee then volunteered to give copies of the material to management officials to ensure that it contained nothing objectionable.[73] On June 5, the worker submitted five documents for approval prior to their distribution: a membership application to CAPP contain-

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[64] *Id.* at 280, 143 L.R.R.M. at 2370.

[65] *Motorola*, 991 F.2d at 280, 143 L.R.R.M. at 2370.

[66] *Id.* CAPP focused its energies on securing the passage of a proposed local ordinance which would restrict or prohibit employers from subjecting their workers to mandatory random drug tests. *Id.* To effectuate this goal, CAPP members held press conferences, campaigned for city council candidates who supported the ordinance, participated in radio call-in shows, and contacted state legislators. *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Motorola*, 991 F.2d at 280, 143 L.R.R.M. at 2370.

[71] *Id.*

[72] *Id.*

[73] *Id.*

ing a group position statement and a request for a $15 membership fee; a three-page "fact sheet" describing problems with drug testing; a document containing suggested postcard messages for workers to send to the city council; a two-page article from *Scientific American* casting doubts on drug testing's accuracy; and a handwritten request urging Motorola employees to "join us" and to write to the city council.[74]

After allowing his superiors to review the materials, the company official informed the employee member of CAPP that he could not distribute any of the literature on company property.[75] The company compared CAPP to a political party and told the employee that if Motorola permitted CAPP to hand out its material on the premises, then the company would have to grant the same right to other political groups.[76]

In July 1990, CAPP filed a complaint against Motorola with the Board, alleging that the company's actions toward the employee members of CAPP violated section 8(a)(1) of the NLRA by interfering with the workers' section 7 rights.[77] The Board affirmed the ALJ's ruling that Motorola's refusal to permit distribution of literature on its premises by employee members of CAPP constituted an unfair labor practice.[78] The Board then applied to the Fifth Circuit for enforcement of its order.[79]

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[74] *Id.* at 280–81, 143 L.R.R.M. at 2370–71.

[75] *Motorola*, 991 F.2d at 281, 143 L.R.R.M. at 2371.

[76] *Id.*

[77] *See* Motorola, Inc., 305 N.L.R.B. 580, 580, 139 L.R.R.M. 1002 (1991).

[78] *See id.* at 580, 586, 588. Specifically, the ALJ concluded that Motorola committed four separate unfair labor practices: its refusal to allow the distribution of literature on its premises by employee members of CAPP; its temporary prohibition of employees from wearing T-shirts bearing the slogan "Just Say No to Drug Testing"; and two instances where company officials threatened an employee member of CAPP that his open opposition to the drug testing was disruptive and could have negative consequences, including the possible loss of his job. *See Motorola*, 991 F.2d at 282, 143 L.R.R.M. at 2371.

The T-shirt incident occurred when two employee members of CAPP wore T-shirts which said "Just Say No to Drug Testing" to the plant. *Id.* at 281, 143 L.R.R.M. at 2371. A security guard at the plant informed the employees that, pursuant to orders from management, the shirts were not allowed on company property. *Id.* Later, however, a company official informed the employees that a mistake had been made by the security personnel, who had misunderstood the T-shirt prohibition (they had actually been ordered not to allow T-shirts reading "Just Say No to Management" on the premises). *Id.* The workers subsequently wore these shirts on company grounds without incident. *Id.*

The other incidents which the ALJ and Board held were unfair labor practices occurred soon after the company had announced the mandatory drug testing policy. *See Motorola*, 991 F.2d at 281, 143 L.R.R.M. at 2371. Two different company officials told an employee member of CAPP that his open opposition to the company's drug testing policy was disruptive and could negatively affect his career, including the possible loss of his job. *See id.* at 281–82, 143 L.R.R.M. at 2371.

[79] *Id.* at 282, 143 L.R.R.M. at 2371–72.

The Fifth Circuit denied enforcement of that part of the Board's order which dealt with Motorola's ban of literature distribution on its premises by employee members of CAPP.[80] Although the Board argued that, like the *Eastex* newsletter, the CAPP literature simply urged workers to contact elected officials about an issue which directly affected employees' working conditions, the Fifth Circuit reasoned that the facts in this case reached the "point of attenuation" posited by the *Eastex* Court.[81] The court noted that CAPP members had repeatedly stated that they neither represented Motorola workers nor had a direct goal of changing the company's policy, and furthermore, CAPP itself had initiated and orchestrated the attempted distribution by the employee member of CAPP.[82] Also, the court dismissed the Board's argument that the removal of section 7 protection from the workers' distribution, solely because of the literature's political nature, would frustrate the very purpose of the "mutual aid or protection" clause.[83] Instead, the *Motorola* court agreed with the company's contention that what was "political" was the *purpose* for which the material was to be distributed—the advancement of CAPP's political agenda—and not the material's content.[84] The court also agreed with the company's

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[80] *Id.* at 285, 143 L.R.R.M. at 2374–75. The court also refused to enforce the part of the Board's order resulting form the company's temporary prohibition of the T-shirts bearing an anti-drug testing message. *Id.* at 285, 143 L.R.R.M. at 2374. The court reasoned that Motorola's temporary interference with the wearing of the T-shirts was "too insignificant" to violate the Act. *See Motorola*, 991 F.2d at 283, 143 L.R.R.M. at 2372–73. The court observed that not every interference with workers' § 7 rights rises to the level of an unfair labor practice, and moreover, federal courts had consistently found that merely marginal infringements do not constitute a violation of the NLRA. *Id.* at 283, 143 L.R.R.M. at 2372. The *Motorola* court found that viewed in context, the incident surrounding the T-shirt ban neither required any remedy nor called for the imposition of penalties; the workers suffered little inconvenience; the mistake was corrected within one day; the employees later wore the shirts to work with no adverse consequences, and one of the employees involved described the incident as "trivial." *See id.* at 283 & n.2, 143 L.R.R.M. at 2372–73 & n.2.

On the other hand, the court of appeals did grant the part of the Board's petition to enforce the order regarding the company official's comments to the employee member of CAPP that the latter's opposition to the drug testing policy could have a negative impact on his career. *See id.* at 283–84, 143 L.R.R.M. at 2373. The court of appeals rejected both the company's arguments that the ALJ failed to articulate reasons for his credibility choices in favor of the employee, and that the records as a whole supported the company's version of what happened. *See id.* The court observed that no interference with the ALJ's credibility determinations was called for in this case, for the ALJ had provided clear explanations for his credibility choices, which were neither "inherently unreasonable" nor "self-contradictory." *See Motorola*, 991 F.2d at 283–84, 143 L.R.R.M. at 2373.

[81] *See Motorola*, 991 F.2d at 284, 285, 143 L.R.R.M. at 2373, 2374.

[82] *Id.* at 285, 143 L.R.R.M. at 2374.

[83] *See id.* at 284, 285, 143 L.R.R.M. at 2374.

[84] *See id.* at 285, 143 L.R.R.M. at 2374.

argument that the context of union activity in *Eastex*, and the union's specific workplace goals, distinguished that case from the present one.[85] The court thus concluded that the employee members of CAPP had no rights to distribute the literature under section 7, for the NLRA did not intend to protect entities so far removed from the normal employer-employee relationship.[86]

The court observed that its holding would prevent a situation in which employers would be forced to allow political fringe groups having employee members to distribute literature on company property so long as that splinter group's agenda included some issue which impacted that workplace.[87] The court noted that such groups frequently involve themselves with highly controversial issues which can create an atmosphere of animosity and hostility among employees, something which employers seek to minimize.[88] Thus, the court held that employees acting as members of these outside political organizations could not demand the same section 7 rights as workers engaged in activities for "mutual aid or protection" merely because that outside group focuses on a workplace issue.[89]

Read together, *Local 174* and *Motorola* demonstrate the difficulty employees encounter when they seek to distribute, on their employer's property, materials dealing with "political" issues which affect their livelihood as employees. *Local 174* demonstrates this difficulty in the context of union-initiated distribution of political literature, where the determination of whether section 7 protects the activity depends upon whether the material's content falls on the "protected" side of the continuum created by the Board.[90] On one end of this continuum is literature aimed at encouraging votes for specific candidates, while on the other is material aimed principally at educating employees on political issues that may affect their working conditions.[91] This standard, however, does little to guide employees and unions in their calcu-

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[85] *See Motorola*, 991 F.2d at 285, 143 L.R.R.M. at 2374.

[86] *Id.* The court of appeals further observed that the *Eastex* Court had assumed that at some point, "employees' interest in distributing literature that deals with matters affecting them as employees, but not with self-organization or collective bargaining, [may be] so removed from the central concerns of the Act as to justify application of a different rule than in *Republic Aviation*." *Id.; see also Eastex*, 437 U.S. 556, 573, 98 L.R.R.M. 2717, 2723 (1978).

[87] *See Motorola*, 991 F.2d at 285, 143 L.R.R.M. at 2374.

[88] *Id.*

[89] *Id.*

[90] *See Local 174*, 645 F.2d 1151, 1155, 106 L.R.R.M. 2561, 2563 (D.C. Cir. 1981). *See supra* note 59.

[91] *Local 174*, 645 F.2d at 1155, 106 L.R.R.M. at 2563.

lations of whether the protective ambit of section 7 will extend to the distribution of literature they seek to hand out on company property.

Protection under section 7 is even more difficult to claim outside of the union context. In *Motorola*, the Fifth Circuit's use of the "point of attenuation" prevented employee CAPP members from distributing literature discussing an issue and a proposed statute which, arguably, had more of a direct impact on the workplace than the issues discussed in the *Eastex* newsletter did. Thus, the context of union activity surrounding an attempted distribution plays a critical role in determining whether section 7 will protect a given distribution of literature by employees.[92] Even in a union context, however, section 7 protection depends upon the material's content.[93] Such an approach surely will provide both employers and employees with little guidance in the future.

In conclusion, the Fifth Circuit held in *Motorola* that employees acting as members of outside political organizations which focus on a workplace issue cannot demand the same right under section 7 as workers engaged in activities for "mutual aid or protection."[94] In so holding, the court agreed with Motorola that the "point of attenuation" posited in *Eastex* had been reached in this case, for an outside political group was seeking to use the workplace to advance its own political agenda.[95] Thus, the court reasoned that the NLRA's "mutual aid or protection" clause does not protect groups that are so far removed from the ordinary employer-employee relationship.[96]

F. **Employer's Duty to Continue Discretionary Pay Raises:* Daily News of Los Angeles v. NLRB[1]

Section 8(a)(5) of the National Labor Relation Act[2] ("NLRA") prohibits employers from refusing to bargain collectively with their employees' representatives.[3] The statute requires employers to bargain in good faith.[4] Employers may not unilaterally institute changes regard-

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[92] *See Motorola*, 991 F.2d at 285, 143 L.R.R.M. at 2374.

[93] *See Local 174*, 645 F.2d at 1155, 106 L.R.R.M. at 2563.

[94] *Motorola*, 991 F.2d at 285, 143 L.R.R.M. at 2374.

[95] *See id.*

[96] *See id.*

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[1] 979 F.2d 1571, 142 L.R.R.M. 2001 (D.C. Cir. 1992).

[2] 29 U.S.C. § 158 (1988).

[3] NLRB v. Katz, 369 U.S. 736, 737, 50 L.R.R.M. 2177, 2178 (1962).

[4] *Daily News*, 979 F.2d at 1573, 142 L.R.R.M. at 2002.

ing matters which are subject to mandatory bargaining under § 8(d) and which are in fact under discussion with a union.[5]

In 1962, in *National Labor Relations Board v. Katz*, the United States Supreme Court held that under the NLRA, § 8(a)(5), an employer may not unilaterally institute merit increases unless such increases are fixed or established, i.e. part of a long-standing practice of the employer.[6] The Court reasoned that such increases are effectively a refusal to negotiate and prevent the members of a newly formed union from judging whether the new raises are a departure from past practice.[7] The Court did not address the question of whether § 8(a)(5) prevents employers from discontinuing discretionary merit increases.[8]

Subsequent to *Katz*, the National Labor Relations Board ("Board"), in a series of cases, held that employers may not unilaterally continue discretionary raises and may not unilaterally discontinue established and non-discretionary raises.[9] In 1972, in *Southeastern Michigan Gas Company*, the Board held that the employer violated § 8(a)(5) by unilaterally discontinuing non-discretionary wage increases.[10] The Board reasoned that standard wage increases which were given out annually and which had never been denied to an employee were not truly discretionary.[11] Thus, the Board concluded that the wage increases were an established condition of employment as contemplated in *Katz*.[12]

In 1973, in *Oneita Knitting Mills*, the Board held that an employer violated § 8(a)(5) by granting discretionary merit increases.[13] Focusing on the discretionary aspect of the raise, the Board observed that management awarded different amounts to different employees and did not use any standard evaluation system.[14] The Board concluded, therefore, that the wage increases could not be considered a fixed condition of employment.[15] Relying on *Katz*, the Board reasoned that

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[5] *Katz*, 369 U.S. at 737, 50 L.R.R.M. at 2178.

[6] *Id.* at 747, 50 L.R.R.M. at 2182.

[7] *See id.* at 746, 50 L.R.R.M. at 2182; *Daily News*, 979 F.2d at 1573, 142 L.R.R.M. at 2002.

[8] *See Katz*, 369 U.S. 736, 50 L.R.R.M. 2177.

[9] Anaconda Ericcson Inc., 261 N.L.R.B. 831, 835, 110 L.R.R.M. 1134 (1982) (full opinion not provided in L.R.R.M.); Oneita Knitting Mills, 205 N.L.R.B. 500, 503, 83 L.R.R.M. 1670 (1973) (full opinion not provided in L.R.R.M.); Southeastern Michigan Gas Co., 198 N.L.R.B. 1221, 1222, 81 L.R.R.M. 1350 (1972) (full opinion not provided in L.R.R.M.).

[10] *Southeastern Michigan*, 198 N.L.R.B. at 1222.

[11] *Id.*

[12] *See id.*

[13] 205 N.L.R.B. at 503.

[14] *Id.* at 502.

[15] *Id.*

the unilateral implementation of merit increases undercut the union's ability to negotiate with management and violated § 8(a)(5).[16]

In 1982, in *Anaconda Ericcson Inc.*, the Board upheld the employer's decision, six months after the formation of the union, to discontinue a wage increase that it had awarded the previous five years.[17] The Board conceded that it lacked information as to the amounts of the past wage increases, but concluded they were apparently discretionary.[18] The Board emphasized that the duty of the employer under § 8(a)(5) is to maintain the status quo and suggested that awarding the merit increase might have constituted a violation.[19] Finally, the Board noted that the raises, although presented to the union, had not been unconditionally accepted.[20]

During the *Survey* year, in *Daily News of Los Angeles v. National Labor Relations Board,* the United States Court of Appeals for the District of Columbia Circuit remanded for reconsideration a Board ruling that the employer had violated § 8(a)(5) by discontinuing merit pay increases, which were awarded annually but varied in amount, after the formation of a union.[21] The court concluded that the Board's decision was inconsistent with the Board's own case law and was not compelled by *Katz.*[22] Thus, if the Board adopts the court's analysis, then discontinuation of a pay increase which is fixed as to timing but discretionary as to amount may not be a violation of § 8(a)(5).[23]

In 1986, The Daily News of Los Angeles ("The Daily News") began awarding merit pay increases which varied in amount, based on the individual employee's performance review, but were awarded annually on the date of the employee's anniversary of joining the newspaper.[24] Between 80 and 85 percent of the employees received raises in 1986 and 1987.[25] The raises that were awarded ranged between 2% and 40%.[26]

In May 1989, the Los Angeles Newspaper Guild, Local 69, ("The Guild") was certified as the collective bargaining agent for certain

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[16] *Id.* at 502–03.

[17] 261 N.L.R.B. 831, 835 (1982).

[18] *Id.* at 834.

[19] *Id.* at 835.

[20] *Id.*

[21] 979 F.2d 1571, 1576, 142 L.R.R.M. 2001, 2005 (D.C. Cir. 1992).

[22] *Id.*

[23] *See id.*

[24] *Id.* at 1572, 142 L.R.R.M. at 2001. Employees were given one of four ratings: fails to meet standards, needs improvement to meet standards, meets standards, and exceeds standards. *Id.* at 1575, 142 L.R.R.M. at 2004.

[25] *Id.* at 1572, 142 L.R.R.M. at 2001.

[26] *Daily News,* 979 F.2d at 1572, 142 L.R.R.M. at 2001.

editorial employees.[27] In June 1989, The Daily News informed The Guild that it was considering discontinuing the merit increases and sought The Guild's opinion.[28] The Guild informed the newspaper that it would view such an action as an unfair labor practice.[29] While The Daily News continued to perform annual reviews, it discontinued the wage increases despite The Guild's warning.[30] The Guild responded by filing a complaint with the Board, alleging that the discontinuation of the wage increases was a violation of § 8(a)(5) because the action was unilateral.[31]

In a split decision, the Board ruled that the unilateral discontinuance of the merit pay increases was a violation of § 8(a)(5) and ordered The Daily News to give its employees the raises they would have received.[32] The Board reasoned that § 8(a)(5) requires employers to maintain existing terms and conditions of employment until there are negotiated changes or an impasse in bargaining.[33] The Board emphasized that although the amount of the raises was discretionary, the timing was not, and thus it viewed the raises as an established term of employment.[34] In its decision, the Board relied on a footnote in *Oneita* which stated that employers with a prior established merit increase program may neither unilaterally continue nor discontinue that program once an exclusive bargaining agent is selected.[35] The Board listed, but did not explain, three reasons why *Anaconda* was distinguishable: 1) the wage increases were discretionary in amount, 2) the parties during negotiations had begun bargaining over wages, and 3) the union had not unconditionally agreed to the wage increase.[36] The Daily News petitioned the court for review of the Board's decision.[37]

In a unanimous decision, the court remanded the case to the Board for reconsideration of whether its decision was in conflict with

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[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Daily News*, 979 F.2d at 1572, 142 L.R.R.M. at 2001.

[32] *Daily News*, 304 N.L.R.B. 511, 512, 138 L.R.R.M. 1132, 1133 (1991).

[33] *Id.* at 511, 138 L.R.R.M. at 1133.

[34] *Id.*

[35] *Id.* The Board also cited several prior cases in which it found employers unlawfully discontinued merit wage programs during negotiations with newly certified unions. *Id.* (citing Central Maine Morning Sentinel, 295 N.L.R.B. 376, 131 L.R.R.M. 1554 (1989); Rochester Inst. of Technology, 264 N.L.R.B. 1020, 111 L.R.R.M. 1361 (1982), *enf. denied*, 724 F.2d 9 (2d Cir. 1983); Allied Prod. Corp., 218 N.L.R.B. 1246, 89 L.R.R.M. 1441 (1975); General Motor Acceptance Corp., 196 N.L.R.B. 137, 79 L.R.R.M. 1662 (1972)).

[36] *Daily News*, 304 N.L.R.B. at 512, 138 L.R.R.M. at 1133.

[37] *Daily News*, 979 F.2d at 1572, 142 L.R.R.M. at 2001.

its own precedents.[38] Pointing to what it perceived to be an inconsistency between this decision and previous Board decisions, the court described the Board's ruling as either a switch in course without "reasoned analysis" or evidence of "hopping at random from one view to another."[39] In its analysis the court focused on the Board's failure to sufficiently distinguish between discretionary and non-discretionary raises.[40] The court concluded that the Board's case law indicated that employers could discontinue discretionary merit pay increases.[41]

First the court noted that in none of the Board's previous cases had it justified an extension of *Katz* to discontinuance of merit increases.[42] The court stated that *Katz* simply did not address discretionary wage increases.[43] Noting that the Board in this case did not expressly indicate it was extending *Katz*, the court concluded that the Board's decision must be based on its own precedents.[44]

The court also reasoned that the Board's reliance on a footnote in *Oneita* was misplaced.[45] The court noted that *Oneita* involved the granting of wage increases, not decreases, and thus was not directly on point.[46] The *Oneita* footnote indicated that the Board in *Southeastern Michigan* had ruled that employers could not unilaterally discontinue merit decreases under § 8(a)(5).[47] The court, however, noted that the discontinued pay increase in *Southeastern Michigan* was an automatic increase of five percent which no employee had ever been denied.[48] Thus, it concluded that *Oneita*, at most, stood for the proposition that employers may not discontinue *non-discretionary*, fixed pay raises.[49] The court concluded that neither *Southeastern Michigan* nor *Oneita* in-

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[38] *Id.* at 1576, 142 L.R.R.M. at 2005.

[39] *Id.*

[40] *See id.* at 1573–74, 142 L.R.R.M. at 2003.

[41] *Id.* at 1574, 142 L.R.R.M. at 2003.

[42] *Daily News*, 979 F.2d at 1574, 142 L.R.R.M. at 2003.

[43] *Id.* at 1573, 142 L.R.R.M. at 2002. The court discussed at some length how it had interpreted *Katz* in NLRB v. Blevins Popcorn Co., 659 F.2d 1173, 107 L.R.R.M. 3108 (D.C. Cir. 1981). *Id.* at 1574–75, 142 L.R.R.M. at 2003–04. The court concluded that while *Blevins* at first blush seemed to support the Board, in the end it proved to be ambiguous, which the court suggested might be why it was not cited by the Board. *Id.* It stated that *Blevins* appeared to mean that a wage increase can be considered non-discretionary even though it has some discretionary aspects. *Id.* Thus, the court concluded that *Blevins* simply brought the issue back to Board precedents on how automatic a pay raise can be before it is no longer considered discretionary. *Id.* at 1575, 142 L.R.R.M. at 2003.

[44] *See id.* at 1573, 142 L.R.R.M. at 2002.

[45] *Id.*

[46] *Id.*

[47] *Daily News*, 304 N.L.R.B. at 511, 138 L.R.R.M. at 132.

[48] *Daily News*, 979 F.2d at 1573–74, 142 L.R.R.M. at 2003.

[49] *Id.*

dicated that an employer cannot discontinue discretionary pay increases.[50]

The court also distinguished NLRB cases in which the Board found that the discontinuance of merit pay raises violated § 8(a)(5) even though the raises were partly discretionary.[51] The court concluded that the raises in those cases were less discretionary than the raises in the instant case.[52] Specifically referring to one case in which the employer unilaterally discontinued raises which ranged between ten and twenty-five cents per hour based on performance, the court concluded that the discretion in this group of cases was sufficiently narrow to distinguish them from the instant case.[53]

The court concluded that the only precedent directly on point, *Anaconda*, should have led the Board to validate The Daily News' decision to discontinue the wage increase, not invalidate it.[54] The court summarily dismissed the Board's analysis of *Anaconda*, concluding that none of the three distinguishing factors provided by the Board were, in fact, true distinctions.[55] It noted that the first distinction, that the wage increases were discretionary in amount, was equally applicable to The Daily News, and thus was not a basis for distinguishing *Anaconda*.[56] The court dismissed The Guild's argument that because The Daily News used a standardized rating system the amounts were not discretionary.[57] The court reasoned that a rating system would only render raises non-discretionary if the rating system itself was "substantially free of subjectivity" and "specific ratings corresponded systematically with specific percentage increases."[58] The court described The Daily News' rankings as "vague" and noted that not even The Guild had suggested that each of the four categories led to a fixed percentage increase.[59] The court concluded, therefore, that the amounts were discretionary in both *Anaconda* and the instant case.[60]

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[50] *Id.* at 1574, 142 L.R.R.M. at 2003.

[51] *Id.*

[52] *Id.*

[53] *Daily News*, 979 F.2d at 1574, 142 L.R.R.M. at 2003 (citing Rochester Inst. of Technology, 264 N.L.R.B. 1020, 111 L.R.R.M. 1361 (1982)).

[54] *Id.*

[55] *Id.* at 1575, 142 L.R.R.M. at 2004.

[56] *Id.* The court noted that the pay increases in both cases were discretionary as to amount but not as to regularity. *Id.*

[57] *Id.*

[58] *Daily News*, 979 F.2d at 1575, 142 L.R.R.M. at 2004.

[59] *Id.*

[60] *Id.*

The court concluded that the Board's second reason for distinguishing *Anaconda*, the beginning of negotiation over wages, also collapsed.[61] The court noted that in both cases negotiation over the discretionary increases had begun but in neither case had the parties reached an impasse which would have ended the employer's duty to maintain existing conditions.[62] The court expressed doubt that a difference in the amount of wage bargaining would even be relevant.[63]

Finally, the court dismissed the Board's third reason for distinguishing *Anaconda*: that the union had not unconditionally agreed to the wage increase.[64] Based on its reading of the factual record, the court observed that The Guild had not waived its right to bargain over the increase.[65] Thus it concluded that in both cases the unions had not unconditionally agreed to the wage increase.[66]

In remanding the case, the court invited the Board to consider two additional issues which had not been previously raised, but according to the court, had an obvious bearing on the logic of the Board's policy.[67] First, the court questioned how the Board could enforce its order that The Daily News pay the employees the additional amount they would have received from the discretionary raises.[68] The court reasoned that the amount was "unascertainable" by virtue of being discretionary.[69] Second, the court highlighted the Board's lack of power, under its general authority to enforce good-faith bargaining, to regulate what economic weapons parties may use.[70] The court suggested that because lockouts are not a *per se* violation of § 8(a)(5) it would be counter-intuitive to have a *per se* ban on decreasing wages or benefits, economic weapons it described as less drastic.[71]

The court's decision to remand the case to the Board for reconsideration might pave the way for allowing employers to unilaterally discontinue wages which were awarded on a regular basis but were discretionary as to amount.[72] Not only was this an option which em-

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[61] *Id.*

[62] *Id.* at 1576, 142 L.R.R.M. at 2004–05.

[63] *See Daily News*, 979 F.2d at 1576, 142 L.R.R.M. at 2004–05.

[64] *Id.* at 1576, 142 L.R.R.M. at 2005.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Daily News*, 979 F.2d at 1577, 142 L.R.R.M. at 2005.

[69] *Id.*

[70] *Id.* at 1577, 142 L.R.R.M. at 2005–06 (citing NLRB v. Insurance Agents' Int'l Union, AFL-CIO, 361 U.S. 477, 490, 45 L.R.R.M. 2704, 2709 (1960); American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 317–18, 58 L.R.R.M. 2672, 2679 (1965)).

[71] *Id.* at 1577, 142 L.R.R.M. at 2006.

[72] *See id.* at 1576, 142 L.R.R.M. at 2005.

ployers seemingly had prior to the Board's decision in *Daily News*,[73] but the court made it very clear that the Board, in order to depart from its prior precedent, will have to provide a well-reasoned justification for such a departure.[74] Were the Board to be persuaded by the court's analysis and reverse its decision, employers would not lose their ability to discontinue discretionary raises simply because they awarded those raises on a regular basis.[75]

The court's decision, however, leaves the Board room to support the position it took initially.[76] Under the court's analysis, *Katz* neither compels nor precludes the result at which the Board arrived.[77] Thus, should the Board, which was divided when it first decided the case, be inclined to defend its previous decision, it would have to provide the "reasoned analysis" for reversing its position in *Anaconda* which was missing in its decision in *Daily News*.[78]

While the law concerning discretionary pay increases is still unclear pending the Board's reconsideration, the court more specifically spelled out what constitutes a discretionary pay increase and what does not.[79] To fall under the category of non-discretionary, the increases must be based on non-subjective standards and the raises must strictly correlate to the evaluations under those standards.[80] A system of awarding merit pay increases which does not rise to that level will be considered discretionary and the employer will retain his ability to discontinue the wage increases even after its employees have formed a union.[81] Moreover, a series of raises in which there is a great degree of variance is more likely to be considered discretionary than a series of pay increases in which there is little variance.[82]

In conclusion, the court's decision in *Daily News of Los Angeles v. NLRB* still leaves unresolved what an employer's rights are when it has regularly awarded past merit pay increases but has used discretion in determining the amount. The court signalled its belief that under the Board's precedents, employers indeed have the right to unilaterally

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[73] *See Anaconda*, 261 N.L.R.B. 831, 835, 110 L.R.R.M. 1134 (1982).

[74] *Daily News*, 979 F.2d at 1576, 142 L.R.R.M. at 2005. Presumably, the court's message will extend beyond this case; the Board is certainly on notice that it cannot lightly dismiss its own precedents which call for a different decision than the one the Board is inclined to make.

[75] *See id.* at 1575, 142 L.R.R.M. at 2004.

[76] *Id.* at 1576, 142 L.R.R.M. at 2005.

[77] *Id.* at 1574, 142 L.R.R.M. at 2003.

[78] *Id.* at 1576, 142 L.R.R.M. at 2005.

[79] *See Daily News*, 979 F.2d at 1575, 142 L.R.R.M. at 2004.

[80] *See id.*

[81] *See id.*

[82] *See id.* at 1574, 142 L.R.R.M. at 2003.

discontinue those pay increases even after the formation of a union.[83] But because the remand leaves the Board room to reverse its previous holdings, it is probably too early for employers to take too much comfort from the decision.

II. National Labor Relations Board's Scope of Authority

A. **Board's Power to Issue Broad Remedial Measures Directed at Labor Consultants Who Have Not Been Officially Named in Previous Cases:* Blankenship and Associates v. NLRB[1]

The National Labor Relations Act ("NLRA"), passed by Congress in 1935, regulates the conduct of employers with respect to their union counterparts.[2] The purpose of the NLRA is to facilitate the practice of collective bargaining and to protect employees' right of self-organization by a representative of their own choosing.[3] The NLRA provides the National Labor Relations Board ("Board") with the statutory authority to order employers or their agents found to have violated any provision of the NLRA to cease and desist from this unlawful conduct.[4] When furnishing remedies, the Board is fully empowered by the NLRA to examine prior bad acts by employers and their agents.[5] This practice of reviewing prior bad acts allows the Board to issue appropriate remedial measures in cases involving employers or agents who have repeatedly violated the NLRA and thus frustrated the collective bargaining process.[6]

In 1972, in *Chalk Metal Company*, the Board held that a labor consultant's prior bad acts could be used to justify broad remedial measures despite the fact that the consultant had only been officially named as a respondent in one previous case.[7] The Board noted, however, that the consultant had repeatedly violated the NLRA in the past by failing to bargain in good faith while acting as an agent for various employers.[8] Citing these prior bad acts, the *Chalk* Board issued a cease

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[83] *Id.* at 1575, 142 L.R.R.M. at 2004.

* By Douglas J. McDermott, Staff Member, Boston College Law Review.

[1] 999 F.2d 248, 143 L.R.R.M. 2817 (7th Cir. 1993).

[2] *See* National Labor Relations Act, 29 U.S.C. §§ 151–69 (1988). The NLRA also regulates the conduct of unions with respect to employees. *Id.*

[3] *See* 29 U.S.C. § 151.

[4] 29 U.S.C. § 160(c). § 152(2) of the NLRA defines the term employer to include any agent acting on behalf of the employer. 29 U.S.C. § 152(2).

[5] *See Blankenship*, 999 F.2d at 250–52, 143 L.R.R.M. at 2819–20.

[6] *See* Chalk Metal Co., 197 N.L.R.B. 1133, 1133, 80 L.R.R.M. 1516, 1519 (1972).

[7] *See id.*

[8] *See* West Coast Gasket Co., 469 F.2d 871, 874–75, 81 L.R.R.M. 2857, 2860 (9th Cir.

and desist order which prevented the consultant from engaging in unlawful activities not only under the facts in that case, but also in all future agency relationships as well.[9]

In justifying the broad cease and desist order against the consultant, the *Chalk* Board first explained that jurisdiction over the consultant was based on the interstate commerce of the employer.[10] According to the Board, once the employer satisfied the Board's self-imposed jurisdictional limits, any agent violating the NLRA on that employer's behalf falls within the Board's jurisdictional reach.[11] The Board reasoned that an employer's duty to bargain in good faith applies to all agents acting on its behalf.[12]

Next, the *Chalk* Board determined that the broad cease and desist order was an appropriate remedy because of the consultant's propen-

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1972) (consultant and employer ordered to cease and desist from failing to bargain in good faith). The consultant in *West Coast Gasket* was Gladys Selvin, the same consultant that was involved in *Chalk Metal Co. See id.* In addition, Selvin was also involved in a number of other cases as the instigator of various unfair labor practices on behalf of the employer. *See, e.g.*, Inter-Polymer Indus., Inc., 196 N.L.R.B. 729, 742–58, 80 L.R.R.M. 1509, 1510–15 (1972) (employer violated Labor Management Relations Act ("LMRA") by failing to bargain in good faith due to strategies of Selvin which were designed to prevent meaningful bargaining); KFXM Broadcasting Co., 183 N.L.R.B. 1187, 1193–96, 76 L.R.R.M. 1852, 1853 (1970) (employer violated LMRA by refusing to bargain in good faith when Selvin refused to schedule meetings, unilaterally cancelled meetings, and came to meetings unprepared); Sir James Inc., 183 N.L.R.B. 256, 260, 74 L.R.R.M. 1511, 1512 (1970) (employer violated duty to bargain in good faith where Selvin actively worked to destroy the union's designation as bargaining representative); Architectural Fiberglass, 165 N.L.R.B. 238, 239, 65 L.R.R.M. 1331, 1332 (1967) (employer violated duty to bargain in good faith when Selvin insisted on the use of a tape recorder during negotiations against union objections); Tak-Trak, Inc., 145 N.L.R.B. 1511, 1519, 55 L.R.R.M. 1205, 1205 (1964) (union forced to stop pressuring employer to dismiss Selvin even though she had proven unwilling, in this case and past cases, to bargain in good faith); Duro Fittings Co., 130 N.L.R.B. 653, 657–58, 47 L.R.R.M. 1363, 1364–65 (1961) (employer violated LMRA duty to bargain in good faith when Selvin attempted to unilaterally control mandatory bargaining topics); California Girls, Inc., 129 N.L.R.B. 209, 213, 46 L.R.R.M. 1533, 1533–34 (1960) (employer failed to bargain in good faith as Selvin's position was predetermined and inflexibly geared towards rejecting all union proposals).

[9] 197 N.L.R.B. at 1133, 80 L.R.R.M. at 1519.

[10] *Id.* at 1152, 80 L.R.R.M. at 1518. *See also* National Lime & Stone Co., 62 N.L.R.B. 282, 308, 16 L.R.R.M. 188, 190–91 (1945) (court explained that a labor relations organization employed by a manufacturing company is an employer under NLRA definition since it was acting as an agent for the company).

[11] *See Chalk*, 197 N.L.R.B. at 1152, 80 L.R.R.M. at 1518. The Board's relevant self-imposed jurisdictional limits require that an employer have more than $50,000 in interstate commerce for the Board to exercise jurisdiction over them under the NLRA. *See* NLRB v. Mars Sales and Equip. Co., 626 F.2d 567, 575, 105 L.R.R.M. 2138, 2144 (7th Cir. 1980) (court explained that the Board has jurisdiction over an employer whose out of state purchases exceeded the $50,000 self-imposed jurisdictional minimum).

[12] *See Chalk*, 197 N.L.R.B. at 1152, 80 L.R.R.M. at 1518. *But cf.* St. Francis Fed'n of Nurses v. N.L.R.B., 729 F.2d 844, 857, 115 L.R.R.M. 3352, 3363 (D.C. Cir. 1984) (court focused on the agent's commerce to see if it satisfied the Board's thresholds for jurisdiction unlike in *Chalk* where the Board focused on the employer's commerce).

sity to violate the NLRA.[13] The *Chalk* Board established the consultant's propensity to engage in unfair labor practices by examining past cases involving the consultant.[14] The consultant, however, had only officially been named as a respondent in one of the previous cases.[15] The Board reasoned that the one case in which the consultant was officially named as a respondent, when viewed in conjunction with the numerous cases where the consultant was not named but obviously directly involved in NLRA violations, was sufficient to establish the consultant's tendency to commit unfair labor practices.[16] To effectuate the intentions of the NLRA and to prevent the consultant from frustrating meaningful bargaining in future cases, the Board ordered the consultant to cease and desist from the practice of bad faith bargaining while acting on behalf of any employer.[17]

In 1975, the United States Court of Appeals for the Ninth Circuit reaffirmed the Board's *Chalk* analysis in *NLRB v. Selvin* by upholding the Board's right to use a consultant's prior bad acts to justify broad remedial measures.[18] The consultant in *Selvin* had been officially named as a respondent in two previous cases and, according to the court, was undoubtedly involved in numerous other NLRA violations.[19] In supporting the Board's finding and broad cease and desist order, the *Selvin* court held that the Board had the power and discretion to issue broad remedial measures as it saw fit once the consultant's propensity to violate the NLRA had been established.[20] To demonstrate and establish the consultant's propensity to engage in unfair labor practices, the court stated that it was proper for the Board to consider the consultant's previous labor relations record.[21] This record, according to the court, included not only the cases in which the consultant was formally named as a party, but also cases where the agent was not named but was indisputably involved in NLRA violations.[22] The court explained that the combination of the two cases in which the consultant was named and the numerous instances where the consultant was involved in NLRA violations yet not charged clearly demonstrated the

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[13] *See Chalk*, 197 N.L.R.B. at 1133, 80 L.R.R.M. at 1519.
[14] *See id.*
[15] *Id.*
[16] *Id.*
[17] *See id.*
[18] *See* N.L.R.B. v. Selvin, 527 F.2d 1273, 1277, 90 L.R.R.M. 2829, 2832 (9th Cir. 1975).
[19] *See id.* at 1275 n.1, 90 L.R.R.M. at 2830 n.1.
[20] *See id.* at 1277, 90 L.R.R.M. at 2832.
[21] *Id.* at 1277, 90 L.R.R.M. at 2831.
[22] *See id.* at 1277, 90 L.R.R.M. at 2832.

consultant's propensity to violate the NLRA and accordingly allowed the Board to furnish the necessary remedy.[23] Thus, the *Selvin* court upheld the Board's use of a consultant's prior bad acts, not only in cases where the consultant was named as a respondent, but also in cases in which the consultant was not officially named, in order to justify a broad cease and desist order.[24]

During the *Survey* year, in *Blankenship & Associates v. NLRB*, the United States Court of Appeals for the Seventh Circuit held that the Board was authorized to issue broad remedial measures against a labor consultant who was involved, but had not been formally named as a party in any previous cases.[25] The court enforced the Board's broad cease and desist order against the consultant because of the consultant's egregious behavior, the need for an effective remedy, and the discretion afforded the Board in formulating remedial measures.[26] The court, nonetheless, rebuked the Board for its casual use of questionable evidence and its failure to deal with the issue of jurisdiction.[27] In affirming the Board's broad remedial measure, the *Blankenship* court supported the Board's power to use, in limited circumstances, a consultant's prior record which consisted entirely of cases where the consultant was not named as a party.[28]

In *Blankenship*, Gress Poultry ("Gress"), a Pennsylvania poultry processor, hired an Indiana based labor consultant, Rayford Blankenship, to help Gress defeat a union campaign designed to organize Gress' workers.[29] To achieve this goal, Blankenship used a variety of coercive tactics.[30] He told the employees that if the union won the election, Gress' processing plant would be closed.[31] Blankenship mentioned to the employees an instance where this had occurred.[32] To

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[23] *See Selvin*, 527 F.2d at 1277, 90 L.R.R.M. at 2831–32.

[24] *Id.*

[25] *See* Blankenship and Associates v. NLRB., 999 F.2d 248, 251–52, 143 L.R.R.M. 2817, 2819–20. The consultant had not been a respondent in the previous cases, but had been identified in each of the cases as the instigator of various unfair labor practices. *See, e.g.*, Coronet Foods, 305 N.L.R.B. 79, 79, 138 L.R.R.M. 1209, 1209 (1991) (employer committed unfair labor practice when Blankenship, serving as the employer's consultant, showed slides at a mandatory employee meeting of companies who leased out work when union won certification); Truck & Dock Serv., 272 N.L.R.B. 592, 592–93, 117 L.R.R.M. 1327, 1327–28 (1984)(employer for whom Blankenship was serving as a consultant violated the NLRA by unilaterally changing overtime provisions without notifying the union).

[26] *Blankenship*, 999 F.2d at 251–52, 143 L.R.R.M. at 2819–20.

[27] *Id.*

[28] *See id.* at 250–52, 143 L.R.R.M. at 2819–20.

[29] *Id.* at 249, 143 L.R.R.M. at 2817.

[30] *See id.* at 249, 143 L.R.R.M. at 2818.

[31] *See Blankenship*, 999 F.2d at 249, 143 L.R.R.M. at 2818.

[32] *Id.*

emphasize his point, Blankenship displayed a large padlock which he stated would be used to lock the doors to Gress if the union won.[33]

Blankenship also directed some of his efforts at the union organizers, publicly chiding them with verbal insults and physical threats.[34] The court noted that on the day of the union election, Blankenship continued and intensified his actions.[35] He directly questioned the union organizers as to how they would find work for all the employees since they would all lose their jobs if the union won.[36] In addition, he exhibited a picture of a lock and told the union organizers, in the presence of the employees, that he was given a similar lock to place on Gress' doors when he closed the plant.[37]

According to the court, Blankenship's efforts proved successful as the union lost the election.[38] The Board's General Counsel then commenced unfair labor practice proceedings against both Gress and Blankenship.[39] Gress promptly settled the case.[40] A hearing was held before an Administrative Law Judge ("ALJ") to determine if Blankenship had engaged in unfair labor practices.[41] The ALJ found that Blankenship had unlawfully interfered with the union election and had thus violated the NLRA.[42] This decision, according to the ALJ, was based entirely on Blankenship's conduct in the present case.[43] Although the ALJ mentioned seven previous decisions where Blankenship had clearly violated the NLRA on behalf of Gress but was never formally named as a respondent, these prior bad acts were not used to infer a proclivity to commit unfair labor practices.[44] The ALJ thus recommended that a cease and desist order be issued to enjoin Blankenship from violating the NLRA while acting on behalf of Gress.[45] Accepting the basic finding of the ALJ, the Board chose to increase

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[33] *Id.*

[34] *See id.* In one instance, Blankenship told a union representative he was fat due to the money he made from the union. *Id.* Blankenship also told another union organizer that although he (Blankenship) was an old man, he was going to "kick the shit" out of him. *Id.*

[35] *See id.* On the day of the election, Blankenship took pictures of the employees with the union organizers. *Id.* In addition, he destroyed a "Vote Yes" union sign in the presence of the employees. *Id.*

[36] *Blankenship*, 999 F.2d at 249, 143 L.R.R.M. at 2818.

[37] *Id.*

[38] *See id.* at 249, 143 L.R.R.M. at 2817.

[39] *Id.* Proceedings were also instituted against Blankenship's company. *Id.*

[40] *Id.*

[41] *See Blankenship*, 999 F.2d at 251, 143 L.R.R.M. at 2819.

[42] *See id.*

[43] *Id.*

[44] *Id.*

[45] *See id.*

the scope of the cease and desist order to prevent Blankenship from committing unfair labor practices while acting as an agent for any employer within the Board's jurisdiction.[46] In support of this decision, the Board considered the facts of the previous cases in which Blankenship was involved yet not named, and used them to justify this broad remedial measure.[47]

In upholding and enforcing the Board's order, the *Blankenship* court divided its analysis into two sections.[48] The first part focused on the jurisdiction issue, because Blankenship claimed that he could not be reached under the Board's domain.[49] The court explained that the Board had jurisdiction over Blankenship under the theory advanced in *Chalk*.[50] Under this approach, the court held that because Gress satisfied the statutory requirements of an employer and thus fell within the Board's jurisdiction, any agent acting on behalf of Gress was also subject to the Board's reach.[51] The court further explained that the Board's jurisdiction should be based on the employer's, not the agent's, involvement in interstate commerce.[52] According to the court, basing jurisdiction on the employer's commerce is the correct reading of the NLRA's definition of employer.[53] The court reasoned that an alternate reading of the definition which focused on the agent's commerce would serve to exclude most unfair labor practices from the Board's jurisdiction.[54]

Second, the court addressed whether the Board was correct in reviewing Blankenship's prior bad acts.[55] The court held that the use of the facts from these previous cases in which Blankenship was not officially named was acceptable, and provided three reasons for their decision.[56] First, the court indicated that the decision by the Board to take notice of these facts from the previous cases complied with the Federal Rules of Evidence.[57] Rule 201(b) mandates that any judicially

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[46] *Blankenship*, 999 F.2d at 251, 143 L.R.R.M. at 2819.

[47] *See id.*

[48] *See id.* at 250–52, 143 L.R.R.M. at 2818–20.

[49] *See id.* at 250, 143 L.R.R.M. at 2818.

[50] *See id.*

[51] *Blankenship*, 999 F.2d at 250, 143 L.R.R.M. at 2818.

[52] *See id.*

[53] *See id.*

[54] *Id.* The court states that most unfair labor practices are actually commited by individuals not engaged in interstate commerce. *See id.*

[55] *See id.* at 250–52, 143 L.R.R.M. at 2819–20.

[56] *Blankenship*, 999 F.2d at 250–52, 143 L.R.R.M. at 2819–20.

[57] *See id.* at 251, 143 L.R.R.M. at 2819.

noticed facts must not be subject to reasonable dispute.[58] While the court noted that the use of these facts was questionable, it reasoned that Blankenship would have objected if these facts were inaccurate.[59] Because Blankenship presented no evidence contradicting the facts of these previous cases to the Board or the Court of Appeals, the court assumed that the findings in the previous cases were on point and consequently not subject to reasonable dispute.

Next, the court justified the Board's use of the prior bad acts due to the need for an effective remedy under the circumstances.[60] The court explained that issuing a cease and desist order that was narrower in scope would serve no function under the present facts.[61] Because Gress had already terminated its relationship with Blankenship, the court noted that a limited cease and desist order would have had no practical effect.[62] The end result, according to the court, would have been that Blankenship was free to engage in unfair labor practices on behalf of other employers.[63] This fact, combined with the flagrant nature of Blankenship's conduct would have caused the Board to issue a broad cease and desist order even without consideration of the previous cases.[64]

Finally, the court explained that the Board was not barred from using these prior bad acts from cases where the consultant was involved yet not named simply because the Board had not done so in the past.[65] The court reasoned that the Board was empowered to depart from precedent if it did so cautiously and with reason.[66] The court noted that while the Board has less freedom than courts to depart from precedent, it still maintained the discretion to change course.[67] The court emphasized that such freedom is necessary for a successful ad-

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[58] FED. R. EVID. 201(b). Rule 201(b) provides:

> A judiciailly noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Id.

[59] *Blankenship*, 999 F.2d at 251, 143 L.R.R.M. at 2819. Blankenship did contend that the employer party in these previous cases may have blamed him for the unfair labor practices, leaving himself no chance to answer to these allegations. *See id.*

[60] *See id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Blankenship*, 999 F.2d at 251, 143 L.R.R.M. at 2819.

[65] *Id.* at 251–52, 143 L.R.R.M. at 2819–20.

[66] *See id.*

[67] *See id.*

ministrative process.[68] The court refuted the idea that by proceeding carefully in the past, the Board had created a rule in which each consultant was entitled one free violation before being subject to broad remedial action.[69] The fact that the Board has not done something before, explained the court, does not limit the Board's future right to engage in that practice.[70]

Although the *Blankenship* court was not complementary of the Board's procedural posture, the court held that the combination of factors, including the compliance with the Federal Rules of Evidence, the egregious nature of Blankenship's conduct, and the Board's power as an administrative agency, justified enforcement of the order.[71] Thus, the *Blankenship* court affirmed the Board's power to review prior bad acts when furnishing remedial measures.[72] The court concluded that even if the Board had strictly adhered to proper procedure, the result would have been the same.[73]

The Seventh Circuit's holding in *Blankenship* represents a moderate step towards a stricter application of the NLRA. Blankenship's flagrant conduct diametrically contravened the important policy concerns behind the NLRA; consequently, the resulting penalty was broad. The court justified exercising greater control over labor consultants to further the purposes of the NLRA to prevent employers from unlawfully interfering in union activity.[74] The *Blankenship* court specifically noted, however, that such control must comply with the established rules of evidence.[75]

In choosing to accept the *Chalk* approach regarding jurisdiction, the court opted to validate the Board's power because Blankenship's role as an agent placed him within the statutory definition of an employer.[76] In doing so, the court was not formulating a new, more encompassing approach for establishing jurisdiction. Instead, it was simply demonstrating its preference for an approach previously employed by the Board and courts. The *Blankenship* court's approach for establishing jurisdiction will gain in significance if other circuits which currently base jurisdiction on the agent's commerce decide to follow suit and implicate consultants as agents of the employers.

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[68] *See id.*

[69] *See Blankenship*, 999 F.2d at 252, 143 L.R.R.M. at 2820.

[70] *See id.*

[71] *See id.* at 250–52, 143 L.R.R.M. at 2818–20.

[72] *See id.*

[73] *See id.* at 252, 143 L.R.R.M. at 2820.

[74] *See Blankenship*, 999 F.2d at 251, 143 L.R.R.M. at 2819.

[75] *See id.*

[76] *Id.* at 250, 143 L.R.R.M. at 2818.

While the court's holding maintains the status quo concerning jurisdiction, it cautiously breaks new ground with respect to a consultant's prior bad acts. By allowing the Board to examine prior cases in which the consultant was not a party but intimately linked to NLRA violations, the court strengthens the Board's power to combat the repeated unfair labor practices of employers' agents. This progress, however, may be tempered by the *Blankenship* court's insistence that evidentiary integrity be maintained.[77] The court indicates that the decision in *Blankenship* may have turned out differently if Blankenship disputed the reliability of the facts of the previous cases.[78] Likewise, the court appeared to be significantly influenced by Blankenship's gross conduct.[79]

Thus, the *Blankenship* court fell short of issuing a per-se rule validating the use of all prior bad acts when the consultant has not been named in any of the previous cases. While the Board's power to regulate labor consultants' conduct has been enhanced, this increased discretion appears limited to certain situations. The facts of the previous cases, where the consultant has been involved but not named, must be undisputed, and the conduct of the consultant must be egregious.[80] When these conditions are satisfied, however, the court has demonstrated its willingness to afford the Board broad discretion in examining prior bad acts and furnishing effective remedies.

In sum, in *Blankenship & Associates v. NLRB*, the Seventh Circuit addressed issues concerning the Board's jurisdiction over employees and the use of an agent's prior bad acts to justify broad remedial measures.[81] The court indicated that jurisdiction under the NLRA should be based on the employer's involvement in interstate commerce, thus placing Blankenship within the Board's reach.[82] The court also held that Blankenship's prior bad acts were admissible to help determine his propensity to violate the NLRA, even though he had not been an official party in any of the previous cases.[83] Due to his flagrant conduct, the need for remedy, and the Board's discretion, the court validated the use of the facts of previous cases.[84] Whether other circuits will follow the *Blankenship* court's reasoning remains to be seen.

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[77] *See id.* at 251, 143 L.R.R.M. at 2819.

[78] *See id.*

[79] *See Blankenship*, 999 F.2d at 251, 143 L.R.R.M. at 2819.

[80] *See id.*

[81] *See id.* at 250–52, 143 L.R.R.M at 2818–20.

[82] *See id.* at 250, 143 L.R.R.M. at 2818.

[83] *See id.* at 250–52, 143 L.R.R.M. at 2819–20.

[84] *See Blankenship*, 999 F.2d at 250–52, 143 L.R.R.M. at 2819–20.

III. ARBITRATION

A. **Ninth Circuit Vacates Arbitrator's Remedy for Violation of Essence of Agreement and Public Policy:* Phoenix Newspapers, Inc. v. Phoenix Mailers Union Local 752[1]

In a series of 1960 cases known as the *Steelworkers Trilogy*, the United States Supreme Court adopted the standard for judicial review of arbitrators' awards and remedies under collective bargaining agreements.[2] The *Steelworkers Trilogy* Court stated that courts must generally defer to arbitrators' decisions.[3] A court, however, may not enforce an arbitration award that does not "draw its essence" from the collective bargaining agreement.[4] Nor may a court enforce an arbitration award that derives from an agreement that, as interpreted by the arbitrator, violates public policy.[5]

In 1982, in *Desert Palace, Inc. v. Local Joint Executive Board of Las Vegas*, the United States Court of Appeals for the Ninth Circuit defined the "essence of the agreement" standard originally set out in the *Steelworkers Trilogy*.[6] The *Desert Palace* court held that the "essence of the agreement" test asks whether the arbitrator's interpretation can be rationally derived from the collective bargaining agreement, viewed in light of its language, content, and any other indicia of the parties' intention.[7] *Desert Palace* involved a dispute between union cocktail servers and their employer over the employer's implementation of a computerized ticketing system that resulted in a sharp decrease in the cocktail servers' gratuities.[8] The union sought arbitration, and the

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[1] 989 F.2d 1077, 142 L.R.R.M. 2819 (9th Cir. 1993).

[2] United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596, 46 L.R.R.M. 2423, 2425 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582–83, 46 L.R.R.M. 2416, 2419–20 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567–68, 46 L.R.R.M. 2414, 2415 (1960).

[3] *See Enterprise Wheel*, 363 U.S. at 596, 46 L.R.R.M. at 2425.

[4] *Id.* at 597, 46 L.R.R.M. at 2425 ("[arbitrator's] award is legitimate only so long as it draws its essence from the collective bargaining agreement").

[5] W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 766, 113 L.R.R.M. 2641, 2645 (1983).

[6] *See* 679 F.2d 789, 791–92, 110 L.R.R.M. 2811, 2812–13 (9th Cir. 1982).

[7] *Id.* at 792, 110 L.R.R.M. at 2812–13.

[8] *Id.* at 790–91, 110 L.R.R.M. at 2811–12. Union cocktail servers at "special events" as defined in the collective bargaining agreement were guaranteed a minimum gratuity of fifteen percent of the ticket price. *Id.* at 790–91, 110 L.R.R.M. at 2812. The employer adopted a computerized ticketing system for some shows in which patrons paid for tickets in advance, paying cocktail servers only for the cost of their drinks. *Id.* at 791, 110 L.R.R.M. at 2812. Under the previous system, patrons paid the entire bill to the cocktail server, including the ticket price. *Id.* The computerized system reduced the cocktail servers' tips dramatically. *Id.*

arbitrator found for the union.[9] The employer sued to vacate the arbitrator's award.[10] The *Desert Palace* court held that a court cannot vacate an arbitrator's award merely because the court disagrees with the arbitrator's interpretation of the parties' collective bargaining agreement.[11] By referring to the agreement itself, past practice, and the parties' bargaining history, the *Desert Palace* court reasoned that the arbitrator's interpretation, while not the only possible one, was plausible.[12] The *Desert Palace* court held, therefore, that a court must uphold an arbitrator's award when the arbitrator's interpretation of the agreement is a rational one, based on the collective bargaining agreement and on any other indicia of the parties' intention.[13]

In 1987, in *United Paperworks International Union v. Misco, Inc.*, the United States Supreme Court further developed the "essence of the agreement" standard and upheld an arbitrator's award as consistent with the collective bargaining agreement.[14] The *Misco* Court upheld the arbitrator's award, despite the arbitrator's refusal to consider evidence of a dismissed employee's marijuana possession on company property.[15] The Court determined that the collective bargaining agreement left construction of evidentiary issues to the arbitrator.[16] Thus, the *Misco* Court held that where the arbitrator's award represents an arguable construction or application of the collective bargaining agreement, the award "draws its essence" from the agreement, and a court may not substitute its judgment for the arbitrator's.[17]

The *Misco* Court held, however, that a court may overturn an arbitration award as a violation of public policy.[18] An overturning court

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[9] *Id.* at 791, 110 L.R.R.M. at 2812.

[10] *Id.*

[11] *Desert Palace*, 679 F.2d at 793, 110 L.R.R.M. at 2813–14.

[12] *See id.* at 792–93, 110 L.R.R.M. at 2813–14.

[13] *See id.* at 793, 110 L.R.R.M. at 2814.

[14] *See* United Paperworks Int'l Union v. Misco, Inc., 484 U.S. 29, 38, 39, 126 L.R.R.M. 3113, 3117 (1987). *Misco* involved an employee who was fired after his arrest for possession of marijuana. *Id.* at 33, 126 L.R.R.M. at 3115. Only after his termination did the company learn he had possessed marijuana on company property, a violation of the company's drug policy. *Id.* The arbitrator refused to consider the evidence discovered after the termination. *Id.* at 34, 126 L.R.R.M. at 3115. The arbitrator then found for the employee, ordering the company to reinstate the employee with back pay. *Id.*

[15] *Id.* at 39, 126 L.R.R.M. at 3117.

[16] *See id.* Since the company did not rely on the evidence of marijuana possession on company property as justification for the discharge, the arbitrator refused to admit such evidence. *Id.* at 34, 126 L.R.R.M. at 3115. The Court noted that refusal to consider evidence that the employer did not rely on at the time of the discharge is a common practice among arbitrators. *Id.* at 39–40 & n.8, 126 L.R.R.M. at 3117 & n.8.

[17] *See id.* at 38, 126 L.R.R.M. at 3117.

[18] *Id.* at 43, 126 L.R.R.M. at 3119.

must determine that the arbitrator's interpretation of the collective bargaining agreement violates a public policy which is (1) explicit, (2) well-defined and dominant and (3) found in the laws and legal precedents rather than in general considerations of supposed public interests.[19] The *Misco* Court held that a public policy against the operation of dangerous machinery while under the influence of drugs was insufficient to overturn an arbitration award.[20] Conceding that the policy was grounded in common sense, the Court noted that the policy did not stem from review of existing laws and legal precedents.[21] Under *Misco*, therefore, a court may overturn an arbitration award as a violation of public policy only if the public policy is explicit, well-defined and dominant, and stems from laws and legal precedents.[22]

During the *Survey* year, in *Phoenix Newspapers, Inc. v. Phoenix Mailers Union Local 752*, the United States Court of Appeals for the Ninth Circuit overturned an arbitrator's order that the parties negotiate a higher wage, holding that the remedy violated the collective bargaining agreement and a clearly expressed public policy.[23] The *Phoenix Newspapers* court determined that the remedy did not "draw its essence" from the agreement because the remedy was both contrary to the intent of the parties and in violation of the collective bargaining agreement's zipper clause.[24] The *Phoenix Newspapers* court also concluded that, because the arbitrator directed the parties to negotiate a higher wage, the remedy violated a clearly expressed public policy against affirmative bargaining found in the National Labor Relations Act ("NLRA").[25] Under *Phoenix Newspapers*, therefore, a court will

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[19] *Misco*, 484 U.S. at 43, 126 L.R.R.M. at 3119. In 1987, in *W.R. Grace & Co. v. Rubber Workers Local 759*, the United States Supreme Court recognized the public policy exception. *See* 461 U.S. 757, 766, 113 L.R.R.M. 2641, 2645 (1983) (arbitrator's award did not violate public policy favoring voluntary compliance with Title VII or obedience to judicial orders, where award required employer to comply with collective bargaining agreement despite conflicting provisions in conciliation agreement between employer and Equal Employment Opportunity Commission ("EEOC")).

[20] 484 U.S. at 44, 126 L.R.R.M. at 3119. The *Misco* Court recognized a split in the Circuit Courts of Appeals regarding the extent of courts' review power, noting that the First and Seventh Circuits had taken a broader view, whereas the Ninth and District of Columbia Circuits had taken a narrower view. *Id.* at 35 & n.7, 126 L.R.R.M. at 3116 & n.7. The *Misco* Court took a narrow view of the courts' review power, emphasizing that when a court overturns an arbitrator's decision on the grounds of public policy, the policy must be clearly expressed in laws and legal precedent. *See id.* at 35, 44, 126 L.R.R.M. at 3116, 3119.

[21] *See id.* at 44, 126 L.R.R.M. at 3119.

[22] *See id.*

[23] 989 F.2d 1077, 1082, 142 L.R.R.M. 2819, 2823 (9th Cir. 1993).

[24] *Id.* The zipper clause stated that the parties had "fully bargained with respect to wages, hours and other terms and conditions of employment . . . ." *Id.*

[25] *Id.* at 1084, 142 L.R.R.M. at 2824–25 (citing NLRA, 29 U.S.C. § 158(d) (1988)).

overrule an arbitrator's remedy if it does not "draw its essence" from the collective bargaining agreement, or if it violates a clearly expressed public policy.[26]

The dispute in *Phoenix Newspapers* involved a collective bargaining agreement ("the agreement") negotiated by Phoenix Newspapers, Inc. ("PNI") and Phoenix Mailers Union Local 752 ("the Union").[27] The agreement governed the rates, hours and working conditions of PNI's mailroom employees.[28] PNI unilaterally made manning changes with regard to an inserting machine in the mailroom.[29] The Union filed a grievance, and the dispute advanced to arbitration.[30]

The arbitrator found that the dispute was arbitrable, that PNI had violated sections two and thirty-two of the agreement[31] and that PNI had violated sections 8(a)(5) and 8(d) of the NLRA.[32] The arbitrator ordered the parties to negotiate a higher wage rate to compensate the employees for the additional work caused by PNI's manning changes.[33] The arbitrator further ordered that if the parties did not reach agreement within sixty days, he would set the higher wage himself.[34]

PNI sued to vacate the award.[35] The United States District Court for the District of Arizona found that the dispute was arbitrable, and that the award and remedy "drew their essence" from the agreement.[36]

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[26] *See Phoenix Newspapers*, 989 F.2d at 1082, 142 L.R.R.M. at 2823.

[27] *Id.* at 1079, 142 L.R.R.M. at 2821.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Phoenix Newspapers*, 989 F.2d at 1079, 142 L.R.R.M. at 2821. Sections two and thirty-two of the agreement provide in relevant part:

> *Section 2:* The Employer recognizes the Union as the exclusive bargaining representative of all employees covered by this agreement . . . .
>
> *Section 32:* . . . It is the intent of the [E]mployer not to undertake any activity which will in any sense undermine or jeopardize [sic] the [U]nion's security or the well being of its members . . . .

Id. at 1081 n.4, 142 L.R.R.M. at 2822 n.4.

[32] *Id.* at 1079, 142 L.R.R.M. at 2821. Sections 8(a)(5) and 8(d) of the NLRA provide in relevant part:

> § 8(a)(5): It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . .
>
> § 8(d): For the purposes of this section, to bargain collectively is . . . to . . . confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .

29 U.S.C. § 158 (1988).

[33] *Phoenix Newspapers*, 989 F.2d at 1079, 142 L.R.R.M. at 2821.

[34] *Id.*

[35] *Id.* at 1079, 142 L.R.R.M. at 2820.

[36] *Id.* at 1079, 142 L.R.R.M. at 2821.

The district court also ordered PNI to pay attorney's fees for bringing the action in bad faith.[37] PNI appealed the district court's decision.[38]

The United States Court of Appeals for the Ninth Circuit reversed in part the decision of the district court.[39] The *Phoenix Newspapers* court affirmed the district court's decision that the dispute was arbitrable.[40] The court further affirmed the district court's finding that the arbitrator's award—a finding that the company had violated the collective bargaining agreement—"drew its essence" from the agreement.[41] The *Phoenix Newspapers* court, nevertheless, reversed the district court's decision that the arbitrator's remedy "drew its essence" from the collective bargaining agreement.[42] The court further held that the arbitrator's remedy violated a clearly expressed public policy.[43] Finally, the *Phoenix Newspapers* court reversed the district court's award of attorney's fees to the union.[44]

The *Phoenix Newspapers* court began its discussion by examining the standard for review of arbitrators' decisions.[45] The court observed that judicial review of arbitrators' decisions merely involves determining whether the dispute was arbitrable and whether the arbitrator's decision was within his authority.[46] The court noted that there is a strong presumption in favor of arbitrability.[47] The court held that the broad language of the agreement supported the district court's finding of arbitrability.[48] Applying this presumption to the facts, the court rejected PNI's contention that the "management rights" doctrine rendered this dispute inarbitrable, noting that the agreement did not contain a "management rights" clause that explicitly granted PNI exclusive powers to make manning changes.[49]

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[37] *Id.* at 1079, 1084, 142 L.R.R.M. at 2821.

[38] *Phoenix Newspapers*, 989 F.2d at 1079, 142 L.R.R.M. at 2821, 2825.

[39] *Id.* at 1085, 142 L.R.R.M. at 2825.

[40] *Id.*

[41] *Id.* at 1081, 1085, 142 L.R.R.M. at 2822–23, 2825.

[42] *See id.* at 1082, 142 L.R.R.M. at 2823.

[43] *Phoenix Newspapers*, 989 F.2d at 1083, 1085, 142 L.R.R.M. at 2824, 2825.

[44] *Id.* at 1085, 142 L.R.R.M. at 2825.

[45] *See id.* at 1080, 142 L.R.R.M. at 2821.

[46] *Id.*

[47] *Id.*

[48] *Phoenix Newspapers*, 989 F.2d at 1080, 142 L.R.R.M. at 2822.

[49] *Id.* (citing Teamsters Union Local 287 v. Frito-Lay, Inc., 849 F.2d 1210, 1213, 128 L.R.R.M. 2759, 2762 (9th Cir. 1988)(even if collective bargaining agreement contains general "management rights" clause, presumption of arbitrability may only be overcome by explicit provision in agreement that issue falls within management rights clause, or by "most forceful evidence" that issue was right of management before agreement was signed)). The "management rights" doctrine stems from the common law view of the employer as property owner, entitling the employer to operate the business as he or she chooses, subject to the limits of legislation or collective

The appeals court next reviewed the district court's decision that the arbitrator's award "drew its essence" from the agreement.[50] The arbitrator ruled that sections two and thirty-two of the agreement required PNI to bargain with the union over the effects of the manning changes.[51] The appeals court upheld the arbitrator's award as a plausible interpretation which "drew its essence" from the agreement.[52]

The *Phoenix Newspapers* court next considered the arbitrator's remedy, the order that the parties negotiate a higher wage for the mailroom workers.[53] The court first considered whether the remedy met the "essence of the agreement" test.[54] The court stated that the "essence of the agreement" test required that the arbitrator's solution be rationally derived from a plausible interpretation of the agreement, viewed in light of the agreement itself and any other indicia of the parties' intention.[55] The court examined the bargaining history of the parties, which showed that the parties would not necessarily have required manning changes to result in a new wage rate.[56] The court stated that the arbitrator correctly ordered the parties to negotiate, but should have allowed them to choose their own solution.[57]

The *Phoenix Newspapers* court next considered the significance of the agreement's zipper clause to the "essence of the agreement" test.[58] Because the clause stated that the parties had "fully bargained with respect to wages . . . and conditions of employment," the court determined that the arbitrator should not have established a new term—a

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bargaining agreements. FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 457 (4th ed. 1985). Management rights have been defined as "those rights, or that authority, which management must have in order successfully to carry out its function of managing the enterprise." *Id.*

[50] *See Phoenix Newspapers*, 989 F.2d at 1081, 142 L.R.R.M. at 2822.

[51] *See id.* at 1081, 142 L.R.R.M. at 2822–23. See *supra* note 31 for text of sections two and thirty two of the agreement.

[52] *Id.* at 1081, 142 L.R.R.M. at 2822.

[53] *Id.* at 1081–82, 142 L.R.R.M. at 2823.

[54] *See id.* at 1082, 142 L.R.R.M. at 2823.

[55] *Phoenix Newspapers*, 989 F.2d at 1082, 142 L.R.R.M. at 2823 (citing Desert Palace, Inc. v. Local Joint Executive Bd. of Las Vegas, 679 F.2d 789, 792–93, 110 L.R.R.M. 2811, 2812, 2814 (9th Cir. 1982)).

[56] *Phoenix Newspapers*, 989 F.2d at 1082, 142 L.R.R.M. at 2823. The arbitrator found that PNI had consistently opposed the Union's attempts to make existing manning practices binding. *Id.* The Union had sought on three separate occasions to incorporate manning practices into the collective bargaining agreement, and PNI refused on every occasion. *Id.* Furthermore, PNI had made previous manning changes for which the Union had not sought arbitration of a new wage. *Id.* The court interpreted these facts to suggest that the parties would not have agreed to a wage hike as the sole remedy for manning changes. *See id.*

[57] *Id.* at 1083, 142 L.R.R.M. at 2824.

[58] *See id.* at 1082, 142 L.R.R.M. at 2823.

higher wage rate—for which the parties did not bargain.[59] The court held that this remedy impermissibly altered the bargaining relationship between the parties.[60] Thus, the *Phoenix Newspapers* court held that the arbitrator's remedy failed to draw its essence from the agreement because it was contrary to the intent of the parties as expressed in the bargaining history, and because it violated the zipper clause which precluded "interest" arbitration.[61]

The *Phoenix Newspapers* court further determined that the arbitrator's remedy, ordering the parties to negotiate a higher wage, violated a clearly expressed public policy found in the NLRA.[62] The *Phoenix*

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[59] *Id.*

[60] *Id.*

[61] *See Phoenix Newspapers*, 989 F.2d at 1083, 142 L.R.R.M. at 2824. The court noted that the arbitrator's remedy comprised improper "interest" arbitration, rather than permissible "rights" arbitration. *Id.* at 1082, 142 L.R.R.M. at 2823. While a "rights" arbitrator merely resolves disputes over interpretation of the agreement, an "interest" arbitrator supplements the agreement with terms to which the parties did not agree. *Id.* In upholding the arbitrator's decision, the district court sought to distinguish the instant case from several improper "interest" arbitration cases by asserting that those cases included clauses that prohibited the arbitrator from altering the agreement. *Id.* at 1083, 142 L.R.R.M. at 2824. *See* Leed Architectural Prods. v. United Steelworkers, Local 6674, 916 F.2d 63, 66, 135 L.R.R.M. 2766, 2769 (2d Cir. 1990)(zipper clause makes agreement the exclusive statement of parties' rights and obligations); Lodge 802, Int'l Bhd. of Boilermakers v. Pennsylvania Shipbuilding Co., 835 F.2d 1045, 1047, 127 L.R.R.M. 2206, 2208 (3d Cir. 1987)(zipper clause demonstrates that arbitrator may not create new terms or conditions not provided for in agreement); Centralab, Inc. v. Local No. 816, Int'l Union of Elec. Workers, 827 F.2d 1210, 1216, 126 L.R.R.M. 2937, 2941–42 (8th Cir. 1987)(where unambiguous language in agreement limits arbitrator's authority to alter agreement, arbitrator is bound by such language). The *Phoenix Newspapers* court disagreed with the district court for two reasons. *See* 989 F.2d at 1083, 142 L.R.R.M. at 2824. First, the district court had ignored the zipper clause in the agreement. *Id.* Second, the *Phoenix Newspapers* court stated that the prior "interest" arbitration cases were not premised on the existence of zipper clauses. *Id.*

The *Phoenix Newspapers* court rejected the district court's conclusion that *Desert Palace* justified the arbitrator's order to negotiate a higher wage. *Id.* The *Desert Palace* court had upheld an arbitrator's modification to an employee compensation method because the relevant contract terms were ambiguous, and the arbitrator's construction of those terms was plausible. *Id.* (citing Desert Palace, Inc. v. Local Joint Executive Bd. of Las Vegas, 679 F.2d 789, 792, 110 L.R.R.M. 2811, 2813 (9th Cir. 1982)). Pointing to the zipper clause and the parties' bargaining history, as well as the absence of a wage reopener provision or an interest arbitration clause, the *Phoenix Newspapers* court determined that there was no ambiguity in the agreement. 989 F.2d at 1083, 142 L.R.R.M. at 2824. The court further concluded that the arbitrator's construction was not plausible. *Id.*

[62] 989 F.2d at 1084, 142 L.R.R.M. at 2824–25. The court relied on the public policy test established by *Grace*, which held that to invalidate an arbitrator's remedy, the public policy must be (1) explicit, (2) well-defined and dominant and (3) demonstrated by reference to laws and legal precedents, not by general public interest considerations. *Id.* at 1084, 142 L.R.R.M. at 2824; *see* W.R. Grace & Co. v. Rubber Workers Local 759, 461 U.S. 757, 766, 113 L.R.R.M. 2641, 2645 (1983). Note that in *Grace* and *Misco* the United States Supreme Court discussed the public policy exception in light of the collective bargaining agreement *as interpreted by the arbitrator*, rather than the arbitrator's award itself. *See* United Paperworks Int'l Union v. Misco, Inc., 484 U.S. 29, 43, 126 L.R.R.M. 3113, 3119 (1987); *Grace*, 461 U.S. at 766, 113 L.R.R.M. at 2645.

Newspapers court reasoned that the NLRA requires good faith bargaining, but does not require affirmative bargaining.[63] The court observed that the remedy ordering the parties to negotiate a higher wage rate within sixty days, or the arbitrator would impose a higher wage himself, exceeded mere "good faith" bargaining and constituted "affirmative bargaining," which the NLRA does not require.[64] The court concluded, therefore, that the arbitrator's order to negotiate *and* to agree on a higher wage rate violated an explicit, well-defined and dominant public policy codified in the NLRA.[65]

In summary, the *Phoenix Newspapers* court held that a court may not enforce an arbitrator's remedy which does not "draw its essence" from the collective bargaining agreement.[66] The court reasoned that the arbitrator's remedy contradicted the intent of the parties as expressed in their bargaining history, and that the remedy violated the agreement's zipper clause.[67] The court also held that the arbitrator's remedy violated a public policy expressed in the NLRA.[68]

The *Phoenix Newspapers* court's application of the "essence of the agreement" test, though advocating broad deference to arbitrators, restricts arbitrators' discretion more than the United States Supreme Court's application of the test in *Misco*.[69] The *Misco* Court stated that the arbitrator could not ignore the plain language of the contract, but as long as the arbitrator is "even arguably construing or applying the contract" the arbitrator's decision must stand.[70] The Ninth Circuit gave a more specific definition in *Phoenix Newspapers*, requiring a rational relationship between the remedy and the agreement; this relationship "must" be viewed in light of the agreement and "any other indicia of the parties' intention."[71] With such mandatory language, the Ninth Circuit prescribes the method of contractual interpretation which arbitrators must use. An arbitrator who limits his or her interpretation to the four corners of the agreement may be reversed under *Phoenix Newspapers* if there are "any other indicia of the parties' intention" that contradict the arbitrator's interpretation.[72] Under the Supreme Court's

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[63] *Phoenix Newspapers*, 989 F.2d at 1084, 142 L.R.R.M. at 2824.

[64] *See id.* at 1084, 142 L.R.R.M. at 2825.

[65] *Id.* at 1079, 1084, 142 L.R.R.M. at 2821, 2824.

[66] *See id.* at 1082, 142 L.R.R.M. at 2823.

[67] *Id.*

[68] *Phoenix Newspapers*, 989 F.2d at 1084, 142 L.R.R.M. at 2824–25.

[69] *See Misco*, 484 U.S. at 38, 126 L.R.R.M. at 3117; *Phoenix Newspapers*, 989 F.2d at 1082, 142 L.R.R.M. at 2823.

[70] *Misco*, 484 U.S. at 38, 126 L.R.R.M. at 3117.

[71] *See Phoenix Newspapers*, 989 F.2d at 1082, 142 L.R.R.M. at 2823.

[72] *See id.*

test in *Misco*, an arbitrator who limits his or her interpretation to the four corners of the agreement is "arguably construing" the agreement, albeit narrowly, and the arbitrator's interpretation must be upheld.[73] While it may be desirable to encourage arbitrators to consult all possible sources, mandating a particular method of interpretation is inapposite with the policy of deference to arbitrators' decisions.[74]

Phoenix Newspapers may have several effects in practice. First, the court's assertion that the arbitrator *must* consider "other indicia of the parties' intention" when construing the agreement may encourage parties to document their intentions at every step of the bargaining process. This would allow them to shift the interpretation of the contract in their favor, or at least prevent the other side from shifting the interpretation in *its* favor. Second, this language may affect the arbitrators themselves. Though the court is unclear about whether an arbitrator's failure to consider "other indicia of the parties' intention" constitutes reversible error, such a suggestion should encourage arbitrators to consider extrinsic evidence of the parties' intention.[75]

Because the *Phoenix Newspapers* court stated that the agreement was unambiguous, the court's examination of extrinsic evidence of the parties' intention was unnecessary.[76] The arbitrator clearly disregarded the zipper clause by imposing a new term for which the parties had not bargained—the higher wage rate.[77] Were the zipper clause ambiguous, then resort to extrinsic evidence of intent would have been necessary. Yet, there was no ambiguity.[78] This may weaken the precedential value of the court's requirement that the "essence of the agreement" must refer in part to extrinsic evidence of the parties' intention.[79]

Phoenix Newspapers represents a deviation from the general rule of judicial deference to arbitration awards.[80] The United States Supreme Court has consistently emphasized the limited role of the courts in reviewing arbitration decisions.[81] In 1987, the Court approvingly

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[73] *See Misco*, 484 U.S. at 38, 126 L.R.R.M. at 3117.

[74] *See Misco*, 484 U.S. at 36–37, 126 L.R.R.M. at 3116; *Phoenix Newspapers*, 989 F.2d at 1081–82, 142 L.R.R.M. at 2823.

[75] *See Phoenix Newspapers*, 989 F.2d at 1082, 142 L.R.R.M. at 2823.

[76] *See id.* at 1083, 142 L.R.R.M. at 2824.

[77] *See id.* at 1082, 142 L.R.R.M. at 2823.

[78] *Id.* at 1083, 142 L.R.R.M. at 2824.

[79] *See id.* at 1082, 142 L.R.R.M. at 2823.

[80] *See, e.g.*, *Misco*, 484 U.S. at 36–37, 126 L.R.R.M. at 3116; W.R. Grace & Co. v. Rubber Workers Local 759, 461 U.S. 757, 764, 113 L.R.R.M. 2641, 2644 (1983); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567–68, 46 L.R.R.M. 2414, 2415 (1960).

[81] *See Misco*, 484 U.S. at 36–37, 126 L.R.R.M. at 3116; *Grace*, 461 U.S. at 764, 113 L.R.R.M. at 2644; *American Mfg. Co.*, 363 U.S. at 567–68, 46 L.R.R.M. at 2415.

noted that the United States Court of Appeals for the Ninth Circuit—the *Phoenix Newspapers* circuit—had adopted the narrower view of the courts' power to set aside arbitration awards.[82] The *Phoenix Newspapers* opinion, however, should serve as a reminder to arbitrators that there are limits to their authority, and that the courts will enforce these limits.

Although it is unusual for a court to overturn an arbitrator's decision, the *Phoenix Newspapers* court was correct in so doing. The arbitrator clearly exceeded his authority by imposing a higher wage rate on the parties.[83] This new term violated the zipper clause, which stated that the parties had fully bargained with respect to wages and conditions of employment.[84] The order to bargain affirmatively violated the public policy expressed in the NLRA, which does not require parties to bargain to an agreement.[85] Even in the United States Court of Appeals for the Ninth Circuit, which interprets the public policy exception very narrowly, the NLRA is sufficiently specific to provide a clearly expressed public policy.

In conclusion, the *Phoenix Newspapers* court held that a court may not uphold an arbitrator's remedy which fails to "draw its essence" from the agreement, or which violates a clearly expressed public policy. The court's application of the "essence of the agreement" test makes extrinsic evidence of the parties' intention an important consideration for arbitrators construing collective bargaining agreements under *Phoenix Newspapers*. Finally, the opinion reinforces prior holdings that the public policy exception requires a public policy that is explicitly defined in existing laws or legal precedent.

B. **Seventh Circuit Evaluates Employer Compliance with Employee Reinstatement Award:* Chrysler Motors Corp. v. International Union, Allied Industrial Workers of America[1]

Section 301(a) of the Labor Management Relations (Taft-Hartley) Act ("LMRA"), enacted by Congress in 1947, permits federal courts to

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[82] *See Misco*, 484 U.S. at 35 n.7, 126 L.R.R.M. at 3116 n.7.

[83] *Phoenix Newspapers*, 989 F.2d at 1083, 142 L.R.R.M. at 2824.

[84] *Id.* at 1082, 142 L.R.R.M. at 2823.

[85] *See* 29 U.S.C. § 158(d) (1988).

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[1] Chrysler Motors Corp. v. Int'l Union, Allied Indus. Workers of Am., 2 F.3d 760, 62 Fair Empl. Prac. Cas. (BNA) 1030 (7th Cir. 1993) [hereinafter *Chrysler III*]. *Chrysler III* is the most recent decision in a series of litigations stemming from Chrysler's discharge of an employee for sexual harassment. *See* Chrysler Motors Corp. v. Int'l Union, Allied Indus. Workers, 748 F. Supp. 1352, 135 L.R.R.M. 2127 (E.D. Wis. 1990) [hereinafter *Chrysler Motors*]; *dismissal of appeal denied*,

enforce collective bargaining agreements between employers and labor organizations.[2] The LMRA seeks to promote peaceful private settlement of disputes in part by providing for the enforceability in federal courts of arbitration awards rendered pursuant to collective bargaining agreements.[3] The United States Supreme Court has long held that unions may resort to the federal courts under section 301(a) when an employer violates an arbitration provision of the collective bargaining agreement.[4] Unions have frequently sought federal court enforcement of arbitrators' reinstatement awards when employers' methods of compliance seemed to violate arbitration awards made pursuant to the collective bargaining agreement.[5]

In 1984, in *Chicago Newspaper Guild v. Field Enterprises*, the United States Court of Appeals for the Seventh Circuit addressed whether an employer's reinstatement letter constituted compliance with an arbitrator's award made pursuant to the collective bargaining agreement.[6] The court held that an employer may not avoid complying with an arbitration award by loosely conforming with the plain language of the award nor by withholding information from arbitration proceedings.[7] In *Chicago Newspaper Guild*, the court determined that the employer's letter which retroactively reinstated the employee for one year and retroactively laid him off did not comply with the arbitration award's requirement of immediate reinstatement with backpay.[8] The court

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909 F.2d 248, 135 L.R.R.M. 2137 (7th Cir. 1990) [hereinafter *Chrysler I*]; *aff'd*, 959 F.2d 685, 58 Fair Empl. Prac. Cas. (BNA) 692 (7th Cir. 1992) [hereinafter *Chrysler II*]; *cert. denied*, 113 S. Ct. 304, 59 Fair Empl. Prac. Cas. (BNA) 1536 (1992); *denial of motion aff'd*, 2 F.3d 760, 62 Fair Empl. Prac. Cas. (BNA) 1030 (7th Cir. 1993) (denial of contempt motion for violation of district court order).

[2] Labor Management Relations (Taft-Hartley) Act, § 301(a), 29 U.S.C. § 185(a) (1988). Section 301(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id.

[3] Textile Workers v. Lincoln Mills, 353 U.S. 448, 454–55, 40 L.R.R.M. 2113, 2115 (1957).

[4] *Id.* at 456, 40 L.R.R.M. at 2116.

[5] *See, e.g.*, *Chrysler III*, 2 F.3d at 762, 62 Fair Empl. Prac. Cas. (BNA) at 1031; Chicago Newspaper Guild v. Field Enter., 747 F.2d 1153, 1155, 117 L.R.R.M. 2937, 2938 (7th Cir. 1984); Truck Drivers, Chauffeurs and Helpers, Local Union 100 v. Liquid Carbonic Corp., 562 F. Supp. 825, 828, 116 L.R.R.M. 2184, 2186 (S.D. Ohio 1983)(employer's reinstatement of employee to layoff status without pay complied with arbitration award).

[6] *Chicago Newspaper Guild*, 747 F.2d at 1155, 117 L.R.R.M. at 2938.

[7] *See id.* at 1156–57, 117 L.R.R.M. at 2939–40. The court also noted that reinstatement did not shield an employee from future lawful disciplinary layoff. *Id.* at 1156, 117 L.R.R.M. at 2939.

[8] *Id.* at 1156, 117 L.R.R.M. at 2939.

concluded that the employer had misinterpreted the plain language of the award.[9] The court further noted that the employer's failure to present information regarding the impact of the layoffs on the employee's former job precluded subsequent use of that information to avoid compliance with the arbitrator's reinstatement award.[10] The court based its holding on the well-established federal policy in favor of arbitration of labor disputes which prevents disputing parties from first withholding information from arbitrators and, subsequently, attempting to use that information to avoid full compliance with an adverse award.[11]

In 1987, in *United Paperworkers International Union v. Misco, Inc.*, the United States Supreme Court considered a related question regarding the validity of an arbitration award in which the arbitrator intentionally did not consider certain evidence presented by the employer.[12] The Supreme Court held that information presented, but justifiably deemed irrelevant, at arbitration may later be used by the employer to justify a subsequent employee discharge action.[13] In *Misco*, the employer discharged an employee for violating the illicit drug possession policy included in the collective bargaining agreement.[14] Days prior to the arbitration hearing, the employer discovered evidence of further drug policy violations which it presented at arbitration.[15] The arbitrator, however, refused to consider such evidence when determining whether the employee was discharged for just cause.[16] He reasoned that employers must have proof in hand prior to discharging employees because it would be illogical to allow companies like Misco to discharge

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[9] *Id.* The employer argued that the letter did comply with the award by retroactively reinstating the employee for the year between the original discharge and the time when the employee's job was eliminated by layoffs. *Id.* The court rejected this argument and held that the plain language of the award required the employer to return the employee to work at the beginning of the next, post-award payroll period rather than merely reinstate him to his former job. *Id.*

[10] *Id.* at 1157, 117 L.R.R.M. at 2940. The court further commented that future employment decisions must be evaluated independently of the original discharge. *Id.* at 1156, 117 L.R.R.M. at 2939.

[11] *See Chicago Newspaper Guild*, 747 F.2d at 1157–58, 117 L.R.R.M. at 2940–41.

[12] United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 39, 126 L.R.R.M. 3113, 3117 (1987).

[13] *Id.* at 41, 126 L.R.R.M. at 3118; *see* Truck Drivers Local 705 v. Schneider Tank Lines, 958 F.2d 171, 174–75, 139 L.R.R.M. 2699, 2702 (7th Cir. 1992)(employer who reinstates employee pursuant to collective bargaining agreement did not violate agreement where reinstated employee is subsequently fired for "fresh reason").

[14] *Misco*, 484 U.S. at 33, 126 L.R.R.M. at 3115.

[15] *Id.*

[16] *Id.* at 34, 126 L.R.R.M. at 3115.

employees and then spend months searching for evidence to justify its action.[17]

The Court, in reviewing the arbitrator's decision to exclude that evidence, noted that it is well established that federal courts may not set aside arbitration awards absent an arbitrator's bad faith refusal to consider evidence such that the refusal constitutes affirmative misconduct.[18] The Court further reasoned that an arbitrator's refusal to consider available evidence does not prevent the employer from using that evidence as the basis for future discharge.[19] Thus, the Supreme Court concluded that the Court of Appeals could not set aside the reinstatement award merely because it disagreed with the arbitrator's refusal to consider evidence which was presented at arbitration but unknown by the employer at the time of the employee discharge.[20]

During the *Survey* year, in *Chrysler Motors Corp. v. International Union, Allied Industrial Workers of America ("Chrysler III")*, the United States Court of Appeals for the Seventh Circuit held that an employer's letter, which simultaneously reinstated and discharged an employee, did not violate the district court's enforcement of an arbitration award which required the employer to reinstate the employee with back pay.[21] The line of Chrysler cases leading to *Chrysler III* involved the reinstatement of a Chrysler employee who had been discharged for sexually harassing a female coworker.[22] The *Chrysler III* court ruled that the arbitrator's refusal to consider evidence upon which Chrysler did not rely when discharging the employee did not preclude Chrysler from using that evidence in an immediate subsequent discharge action.[23] Rather, the *Chrysler III* court reasoned that information presented to, but not considered by, the arbitrator in formulating the reinstatement award constituted "fresh evidence" which Chrysler could use to justifiably discharge the same employee after complying with the reinstatement order.[24]

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[17] *Id.* at 34 n.6, 126 L.R.R.M. at 3115 n.6.

[18] *Id.* at 40, 126 L.R.R.M. at 3118.

[19] *Misco*, 484 U.S. at 41, 126 L.R.R.M. at 3118.

[20] *Id.* at 39, 126 L.R.R.M. at 3117.

[21] *Chrysler III*, 2 F.3d 760, 763–64, 62 Fair Empl. Prac. Cas. (BNA) 1030, 1032–33 (7th Cir. 1993).

[22] *Id.* at 762, 62 Fair Empl. Prac. Cas. (BNA) at 1031.

[23] *Id.* at 763, 62 Fair Empl. Prac. Cas. (BNA) at 1032. The court also held that Chrysler's argument that reinstatement violated public policy did not preclude it from claiming that it had, in fact, complied with the reinstatement order. *Id.* at 764, 62 Fair Empl. Prac. Cas. (BNA) at 1033. Furthermore, the court rejected the union's contention that Chrysler had intentionally prolonged litigation by withholding evidence about the employee's misconduct. *Id.* at 764, 62 Fair Empl. Prac. Cas. (BNA) at 1032–33.

[24] *Id.* at 764, 62 Fair Empl. Prac. Cas. (BNA) at 1032.

On January 10, 1989, Chrysler discharged Ronald Gallenbeck, a fork lift operator, for sexually harassing a female co-worker.[25] The Union protested Gallenbeck's discharge by filing a grievance on his behalf with Chrysler pursuant to the collective bargaining agreement.[26] Chrysler, in turn, denied the grievance, and the dispute proceeded to arbitration.[27]

Following Gallenbeck's discharge but prior to the initial arbitration hearing, Chrysler accumulated evidence that Gallenbeck had sexually harassed female co-workers on four separate occasions.[28] Chrysler presented this additional information at arbitration to further support its position that Gallenbeck was discharged for just cause.[29] The arbitrator refused to consider Chrysler's evidence of additional sexual harassment incidents involving Gallenbeck.[30] The arbitrator reasoned that evidence acquired after Gallenbeck's discharge could not have served as a basis for Chrysler's decision.[31] The arbitrator thus decided that the single incident which led Chrysler to discharge Gallenbeck did not warrant such a severe sanction.[32] Accordingly, the arbitrator reduced Gallenbeck's penalty to a 30-day suspension and ordered Chrysler to reinstate Gallenbeck with back pay.[33]

The arbitration award resulted in a series of federal district and circuit court cases which examined the soundness of the award as well as the validity of Chrysler's method of compliance.[34] In the first of these cases, Chrysler, pursuant to the LMRA, brought suit in the United States District Court for the Eastern District of Wisconsin seeking to have the arbitration award vacated as contrary to public policy.[35] The district court rejected Chrysler's public policy arguments and affirmed the arbitration ruling.[36] Specifically, the court held that Chrysler failed to

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[25] *Chrysler Motors*, 748 F. Supp. 1352, 1355, 135 L.R.R.M. 2127, 2129 (E.D. Wis. 1990). Five days prior to being discharged, Gallenbeck approached a female co-worker from behind and grabbed her breasts. *Id.* at 1355, 135 L.R.R.M. at 2128.

[26] *Id.* at 1355, 135 L.R.R.M. at 2129.

[27] *Id.*

[28] *Chrysler III*, 959 F.2d 685, 686, 58 Fair Empl. Prac. Cas. (BNA) 692, 693 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 304, 59 Fair Empl. Prac. Cas. (BNA) 1536 (1992).

[29] *See id.*

[30] *Id.*

[31] *See id.*

[32] *See id.*

[33] *Chrysler II*, 959 F.2d at 686, 58 Fair Empl. Prac. Cas. (BNA) at 693.

[34] *See Chrysler III*, 2 F.3d at 762, 62 Fair Empl. Prac. Cas. (BNA) at 1031.

[35] *Chrysler Motors*, 748 F. Supp. at 1353, 135 L.R.R.M. at 2127. The Union also motioned for dismissal and counterclaimed for enforcement of the award, prejudgment interest on the back pay and attorneys' fees. *Id.*

[36] *Id.* at 1363, 135 L.R.R.M. at 2135.

identify any well-defined, dominant and explicit public policy sufficiently grounded in federal or state law which conflicted with the reinstatement award.[37] In reaching this conclusion, the court embraced the *Misco* standard that federal courts may overturn arbitration awards on public policy grounds only in those limited cases where the policy at issue is clearly established at law and not merely a general consideration of public welfare.[38] The district court remanded the case to the arbitrator to determine the amount of back pay.[39]

Shortly after filing a notice of appeal with the Seventh Circuit, Chrysler sent a letter to Gallenbeck which purported to reinstate him in accordance with the district court order, yet also simultaneously discharged him again.[40] Specifically, the letter advised Gallenbeck that Chrysler would reinstate him for one day during which they would fire him again based on the evidence of additional incidents of sexual harassment discovered during preparation for the arbitration hearing.[41] In response to the letter, the Union immediately requested that the district court hold Chrysler in contempt for failure to comply with the order for Gallenbeck's reinstatement.[42] The district court, however, refused to hear the Union's contempt motion on the grounds that Chrysler's appeal to the Seventh Circuit had divested the district court of jurisdiction.[43]

The district court's enforcement of the award, Chrysler's letter reinstating and discharging Gallenbeck and the Union's contempt motion led to three separate appeals to the Seventh Circuit known as *Chrysler I, Chrysler II* and *Chrysler III*.[44] In *Chrysler Motors Corp. v. International Union, Allied Industrial Workers* ("*Chrysler I*"), the Seventh

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[37] *Id.* The court noted Chrysler's failure to cite authority in support of the claim that it is illegal to reinstate an employee who has sexually harassed a co-worker on only one occasion. *Id.*

[38] *Id.* at 1359, 135 L.R.R.M. at 2132.

[39] *Id.* at 1365, 135 L.R.R.M. at 2137. The court also rejected the union's claims for prejudgment interest and attorneys' fees, holding that Chrysler's suit was neither frivolous nor in bad faith given the unsettled and evolving nature of the law. *Id.*

[40] *Chrysler III*, 2 F.3d at 762, 62 Fair Empl. Prac. Cas. (BNA) at 1031. The letter stated:

> Pursuant to the evidence uncovered during preparation for the arbitration hearing in this matter which revealed other acts of harassment on your part directed at female coworkers, the decision has been made to terminate your employment effective immediately. However, in lieu of returning you to work only to then effect your discharge, enclosed is check 62306, in the amount of $47.20, less standard deductions, representing compensation for reinstatement for one day.

Id.

[41] *Id.*

[42] *Chrysler I*, 909 F.2d 248, 249, 135 L.R.R.M. 2137, 2137 (7th Cir. 1990).

[43] *Id.*

[44] *Chrysler III*, 2 F.3d at 762, 62 Fair Empl. Prac. Cas. (BNA) at 1031.

Circuit denied the Union's request for dismissal of Chrysler's appeal from the district court's enforcement of the arbitrator's award.[45] The Union, in a failed attempt to return jurisdiction over the contempt motion to the district court, had based its request on the grounds that the district court's order was not final pending the arbitrator's determination of the amount of back pay.[46] In refusing to dismiss Chrysler's appeal, the Seventh Circuit reasoned that a mandatory injunction, such as the order to reinstate Gallenbeck, is immediately appealable without regard to finality.[47] The court also noted that the interlocutory appeal did not divest the district court of jurisdiction to decide a contempt motion.[48] At the Seventh Circuit's request, however, the district court deferred consideration of any contempt motion pending the Seventh Circuit's decision of the Chrysler appeal in *Chrysler II*.[49]

In *Chrysler Motors Corp. v. International Union, Allied Industrial Workers* ("*Chrysler II*"), the United States Court of Appeals for the Seventh Circuit affirmed the district court's enforcement of the arbitration award.[50] It stated that the arbitrator's reinstatement remedy was within the purview of the collective bargaining agreement and public policy.[51] The Seventh Circuit conducted a *de novo* review of the arbitration award[52] and ultimately affirmed that Chrysler had failed to satisfy its burden to provide any well-defined, dominant public policy that precluded reinstatement of an employee who had committed a single known act of sexual harassment.[53] In the absence of any public policy violation, arbitrator bad faith or misconduct, the court considered itself bound to affirm the arbitration award reinstating Gallenbeck.[54]

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[45] *Chrysler I*, 909 F.2d at 250, 135 L.R.R.M. at 2138.

[46] *Id.* at 249, 135 L.R.R.M. at 2137.

[47] *Id.* at 249–50, 135 L.R.R.M. at 2138.

[48] *Id.* at 250, 135 L.R.R.M. at 2138.

[49] *Chrysler III*, 2 F.3d at 762, 62 Fair Empl. Prac. Cas. (BNA) at 1031.

[50] *Chrysler II*, 959 F.2d 685, 689, 58 Fair Empl. Prac. Cas. (BNA) 692, 695 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 304, 59 Fair Empl. Prac. Cas. (BNA) 1536 (1992).

[51] *Id.*

[52] *Id.* at 687, 58 Fair Empl. Prac. Cas. (BNA) at 693. The court reasoned that because public policy is independent of the collective bargaining agreement, the federal courts can properly review whether the arbitration award violates public policy despite being a valid interpretation of a collective bargaining agreement. *Id.*

[53] *See id.* at 688, 58 Fair Empl. Prac. Cas. (BNA) at 694. The court cited the well-recognized public policy against sexual harassment in the work place, noting that the Equal Employment Opportunity Commission requires employers to prevent such conduct at their place of business. *Id.* at 687–88, 58 Fair Empl. Prac. Cas. (BNA) at 693–94. The court did not accept, however, Chrysler's argument that discharging Gallenbeck was necessary to comply with such public policy. *Id.* at 688, 58 Fair Empl. Prac. Cas. (BNA) at 694.

[54] *See id.* at 688, 58 Fair Empl. Prac. Cas. (BNA) at 694.

Following *Chrysler II*, the Union filed another motion for contempt in the district court claiming that Chrysler had failed to reinstate Gallenbeck as required by the district court's order.[55] The district court denied the contempt motion, concluding that Chrysler's letter to Gallenbeck constituted full compliance with the court's reinstatement order.[56] Moreover, the court explained that the letter's notice of discharge fell beyond the scope of the court order because it was based on evidence not considered by the arbitrator's award.[57] The Union appealed the court's denial.[58]

On August 17, 1993, in *Chrysler Motors Corp. v. International Union, Allied Industrial Workers of America* ("*Chrysler III*"), the Seventh Circuit affirmed the district court's denial of the Union's contempt motion.[59] The court held that Chrysler had not violated the district court order enforcing the arbitration award because Chrysler's letter followed the terms of the award by reinstating Gallenbeck, albeit for one day.[60] Chrysler's simultaneous discharge of Gallenbeck did not violate the arbitration award because it was based on evidence presented, but not considered, by the arbitrator's award.[61] The court noted that district courts have the discretion to grant contempt motions when a party violates a specific, direct command of the court.[62] The court implicitly reasoned that the district court is best able to recognize a failure to comply with one of its own commands.[63] Thus, because the district court did not consider Chrysler's letter as contempt of court, the Seventh Circuit considered itself bound to affirm the district court's denial of the motion unless it could find a clear error by the district court.[64]

The Seventh Circuit systematically rejected the Union's two arguments that the district court's denial of contempt was erroneous.[65] The Union first argued that the arbitrator did, in fact, consider the post-discharge evidence of harassment.[66] Thus, the Union claimed that Chrysler could not use such evidence to justify a subsequent dis-

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[55] *Chrysler III*, 2 F.3d at 762, 62 Fair Empl. Prac. Cas. (BNA) at 1031.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* at 764, 62 Fair Empl. Prac. Cas. (BNA) at 1033.
[60] *Chrysler III*, 2 F.3d at 764, 62 Fair Empl. Prac. Cas. (BNA) at 1033.
[61] *Id.* at 764, 62 Fair Empl. Prac. Cas. (BNA) at 1032.
[62] *Id.* at 762, 62 Fair Empl. Prac. Cas. (BNA) at 1031.
[63] *See id.*
[64] *See id.* at 762–63, 62 Fair Empl. Prac. Cas. (BNA) at 1031–32.
[65] *See Chrysler III*, 2 F.3d at 763–64, 62 Fair Empl. Prac. Cas. (BNA) at 1032.
[66] *See id.* at 763, 62 Fair Empl. Prac. Cas. (BNA) at 1032.

charge.[67] Second, the Union contended that Chrysler had intentionally withheld evidence to prolong litigation.[68]

The Seventh Circuit's approach involved a three step analysis of the Union's two arguments.[69] First, the court found that evidence presented to, but not considered by, the arbitrator could be used to justify Chrysler's subsequent discharge action.[70] In developing this "fresh evidence" rule, the court embraced a string of Supreme Court and Seventh Circuit cases which held that when arbitrators refuse to consider evidence acquired after an employee's discharge, the employers may in turn use that same evidence in a subsequent discharge action.[71]

Second, the Seventh Circuit rejected the Union's claim that the arbitrator considered all presented evidence when formulating his award.[72] Instead, the court held that the precise language of the award clearly indicated that the arbitrator did not consider the evidence acquired by Chrysler after it discharged the employee.[73] The court further noted that Chrysler's presentation of all of its evidence to the arbitrator did not necessarily mean that the arbitrator considered all of it when he rendered the award.[74] Thus, according to the court, the reinstatement order covered only the single incident for which Gallenbeck had been originally fired.[75]

Third, the Seventh Circuit rejected the Union's allegations that Chrysler had improperly withheld evidence from the arbitrator as wholly unsupported in the record.[76] The court determined, by looking at the language of the award, that the evidence Chrysler used to almost simultaneously discharge Gallenbeck had, in fact, been introduced at arbitration.[77] Thus, the court concluded that Chrysler's second discharge of Gallenbeck was entirely appropriate because 1) Chrysler

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[67] *See id.*

[68] *Id.* at 764, 62 Fair Empl. Prac. Cas. (BNA) at 1032. The Union also argued that Chrysler's long-held position that the reinstatement order was contrary to public policy estopped Chrysler from arguing that it did reinstate Gallenbeck. *Id.* at 764, 62 Fair Empl. Prac. Cas. (BNA) at 1033.

[69] *See id.* at 763–64, 62 Fair Empl. Prac. Cas. (BNA) at 1032–33.

[70] *See Chrysler III*, 2 F.3d at 763, 62 Fair Empl. Prac. Cas. (BNA) at 1032.

[71] *See id.* at 763–64, 62 Fair Empl. Prac. Cas. (BNA) at 1032; *see also* Truck Drivers Local 705 v. Schneider Tank Lines, 958 F.2d 171, 174–75, 139 L.R.R.M. 2699, 2702 (7th Cir. 1992); *Misco*, 484 U.S. 29, 41, 126 L.R.R.M. 3113, 3118 (1987); *Chicago Newspaper Guild*, 747 F.2d 1153, 1156, 117 L.R.R.M. 2937, 2939 (7th Cir. 1984).

[72] *Chrysler III*, 2 F.3d at 763–64, 62 Fair Empl. Prac. Cas. (BNA) at 1032.

[73] *Id.*

[74] *Id.* at 763, 62 Fair Empl. Prac. Cas. (BNA) at 1032.

[75] *Id.* at 763–64, 62 Fair Empl. Prac. Cas. (BNA) at 1032.

[76] *Id.* at 764, 62 Fair Empl. Prac. Cas. (BNA) at 1032.

[77] *See Chrysler III*, 2 F.3d at 763–64, 62 Fair Empl. Prac. Cas. (BNA) at 1032–33.

presented all of its evidence to the arbitrator; 2) the language of the arbitrator's award indicated that some of that evidence was not considered in rendering the award; and 3) Chrysler subsequently discharged Gallenbeck based only on evidence submitted, but not considered, at arbitration.[78]

In *Chrysler III*, the Seventh Circuit assimilated principles established in *Chicago Newspaper Guild* and *Misco*.[79] In *Chicago Newspaper Guild*, the court established that employers cannot ignore the plain meaning of an arbitration award nor use information known but withheld from the arbitrator to subsequently discharge an employee.[80] In *Misco*, the Supreme Court ruled that arbitrators have the right to exclude from their deliberations evidence presented at arbitration that was acquired after the employee's discharge.[81] The *Misco* Court also noted in dicta that such evidence could be used in a subsequent, independent discharge action.[82] In *Chrysler III*, the Seventh Circuit gave substance to the Supreme Court's dicta by permitting Chrysler to use the evidence not considered by the arbitrator to discharge Gallenbeck simultaneously with reinstatement.[83] The court thus expanded *Chicago Newspaper Guild* and *Misco* to establish a more inclusive determination that information acquired after a discharge action, presented at arbitration, but justifiably not considered by the arbitrator, may be used by the employer in an immediate subsequent discharge action.[84]

By permitting the immediate subsequent discharge of the reinstated employee, the Seventh Circuit undermined the impact of the arbitrator's reinstatement award.[85] In *Chrysler II*, the court made clear that it did not approve of Gallenbeck's behavior.[86] It lacked, however, any legitimate basis for vacating an arbitration award rendered pursuant to the collective bargaining agreement and within the bounds of public policy.[87] The court's *Chrysler III* decision that Chrysler's letter

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[78] *See id.* Also, in response to the Union's contention that Chrysler's public policy argument barred it from claiming that it complied with the reinstatement order, the court ruled that the law of judicial estoppel was inapplicable. *Id.* at 764, 62 Fair Empl. Prac. Cas. (BNA) at 1033.

[79] *See id.* at 763–64, 62 Fair Empl. Prac. Cas. (BNA) at 1032–33.

[80] *Chicago Newspaper Guild*, 747 F.2d 1153, 1156, 117 L.R.R.M. 2937, 2939–40 (7th Cir. 1984).

[81] *Misco*, 484 U.S. 29, 41, 126 L.R.R.M. 3113, 3118 (1987).

[82] *Id.*

[83] *See Chrysler III*, 2 F.3d at 764, 62 Fair Empl. Prac. Cas. (BNA) at 1032.

[84] *See id.*

[85] *See id.*

[86] *Chrysler II*, 959 F.2d 685, 689, 58 Fair Empl. Prac. Cas. (BNA) 692, 695 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 304, 59 Fair Empl. Prac. Cas. (BNA) 1536 (1992).

[87] *See id.*

complied with the order, therefore, constructively vacated the arbitration award which called for Gallenbeck's reinstatement.[88]

As objectionable as Gallenbeck's behavior was, the precedent established by the Seventh Circuit in *Chrysler III* raises concern about the use of evidence acquired after an employer wrongfully discharges an employee. After *Chrysler III*, employers ordered to reinstate an employee can effectively avoid reinstatement by utilizing the Chrysler-style simultaneous reinstatement/discharge letter.[89] By allowing immediate discharge simultaneously with reinstatement, the court has effectively contradicted the Supreme Court's *Misco* principle that it is illogical to allow employers to wrongfully discharge employees and then search for evidence to justify their action.[90] Where *Misco* would permit the use of such evidence in future independent discharge actions, *Chrysler III* broadened the meaning of future independent discharge to include discharges made immediately and simultaneously with reinstatement.[91] Thus, an arbitrator's decision to exclude from consideration evidence acquired after the original discharge merely delays the employers use of that same information until the moment the reinstatement award is rendered.[92]

Consequently, the Seventh Circuit's *Chrysler III* decision should put arbitrators on notice that detailed awards are essential to determine properly what constitutes reinstatement.[93] The precise language of an arbitration award serves as the basis for determining what information was presented to the arbitrator, what information was considered by the arbitrator, and what the arbitrator's award actually mandates.[94] Without such detail, it is impossible to know whether evidence known by a party during the arbitration process and used in a subsequent discharge action had been properly disclosed during arbitration or duly considered in the award.[95] The *Chrysler III* decision also encourages arbitrators faced with evidence acquired after a discharge action to state clearly in their awards whether that evidence was considered in the final arbitration award.[96] Most importantly, the *Chrysler III* decision underscores that arbitrators must be explicit about the

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[88] *See Chrysler III*, 2 F.3d at 764, 62 Fair Empl. Prac. Cas. (BNA) at 1032.

[89] *See id.* at 763–64, 62 Fair Empl. Prac. Cas. (BNA) at 1032.

[90] *See id.*; *see also Misco*, 484 U.S. at 34 n.6, 126 L.R.R.M. at 3115 n.6.

[91] *See Chrysler III*, 2 F.3d at 763, 62 Fair Empl. Prac. Cas. (BNA) at 1032; *see also Misco*, 484 U.S. at 41, 126 L.R.R.M. at 3118.

[92] *See Chrysler III*, 2 F.3d at 764, 62 Fair Empl. Prac. Cas. (BNA) at 1032.

[93] *See id.* at 763–64, 62 Fair Empl. Prac. Cas. (BNA) at 1032.

[94] *See id.* at 763–64, 62 Fair Empl. Prac. Cas. (BNA) at 1032–33.

[95] *See id.*

[96] *See Chrysler III*, 2 F.3d at 763–64, 62 Fair Empl. Prac. Cas. (BNA) at 1032.

actual impact they intend their reinstatement order to have.[97] Thus, the Seventh Circuit's *Chrysler III* three-step approach can work only when the arbitrator clearly states the rationale behind its award.[98]

In conclusion, *Chrysler III* establishes that evidence presented to, but not considered by, the arbitrator constitutes fresh evidence which an employer may use to discharge an employee immediately, even simultaneously, with reinstatement.[99] This outcome represents an extrapolation of the *Chicago Newspaper Guild* and *Misco* holdings.[100] The *Chrysler III* decision should encourage arbitrators to describe in detail the bases of their conclusions and the specific meaning of their award.[101] The courts need explicit language to be able to accurately enforce the intended effect of the award.[102] After *Chrysler III*, employers may use evidence presented, but not considered, by the arbitrator to simultaneously reinstate and discharge an employee where the arbitration award fails to define what constitutes reinstatement.[103]

IV. Fair Labor Standards Act

A. **Local Government May Implement Compensatory Time Scheme Under Fair Labor Standards Act Without Reaching Agreement with Employees' Union:* Moreau v. Klevenhagen[1]

The Fair Labor Standards Act ("FLSA" or "Act") of 1938 requires an employer to pay an employee who works more than forty hours in any given week overtime pay at a rate at least one and one-half times the rate at which that employee is regularly paid.[2] Public employers were originally exempt from the Act.[3] Today, public employers are fully

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[97] *See id.*; *see also Chicago Newspaper Guild*, 747 F.2d 1153, 1156, 117 L.R.R.M. 2937, 2939 (7th Cir. 1984) (the court determined that the employer's letter simultaneously reinstating and laying off the employee failed to comply with the arbitration award which clearly indicated that reinstatement required the employer to return the employee to the payroll even if his former job no longer existed).

[98] *See Chrysler III*, 2 F.3d at 763–64, 62 Fair Empl. Prac. Cas. (BNA) at 1032–33.

[99] *See id.* at 763–64, 62 Fair Empl. Prac. Cas. (BNA) at 1032.

[100] *See id.*

[101] *See id.*

[102] *See id.*

[103] *See Chrysler III*, 2 F.3d at 763–64, 62 Fair Empl. Prac. Cas. (BNA) at 1032.

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[1] 113 S. Ct. 1905, 1 Wage & Hour Cas. 2d 569 (1993).

[2] Fair Labor Standards Act, 29 U.S.C. § 207(a)(1) (1988).

[3] *Id. See* Abbott v. City of Virginia Beach, 879 F.2d 132, 134, 29 Wage & Hour Cas. 609, 610 (4th Cir. 1989), *cert. denied*, 493 U.S. 1051, 29 Wage & Hour Cas. 1016 (1990). Section 207(a)(1) as originally enacted applied to "any . . . employees who in any workweek [are] engaged in commerce or in the production of goods for commerce for a workweek . . . ." 29 U.S.C. § 207(a)(1).

subject to the Act with one special provision.[4] According to § 207(o)(2)(A)(i) public employers may provide compensatory time off or "comp" time in lieu of overtime pay if the employees agree to the substitution according to specified provisions.[5]

The FLSA as passed in 1938 did not cover employees of state and local governments.[6] In 1966, however, Congress amended the Act to cover certain government employees, including certain school, hospital, and nursing home employees.[7] In 1974, Congress again amended the FLSA to extend its coverage to nearly all employees of state and local governments, thus holding public employers to the same standards as private employers.[8]

After limiting states' labor practice decision making with the 1966 and 1974 amendments, Congress changed course in 1985 by amending the FLSA to enable states to provide comp time in lieu of overtime

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[4] 29 U.S.C. § 207(o)(2)(A) (1988). Section 207(o)(2)(A) reads in pertinent part:

> A public agency may provide compensatory time under paragraph (1) only-
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> (A) pursuant to (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of work . . . .

Id.

[5] *Id.*

[6] 29 U.S.C. § 207(a); *See Abbott*, 879 F.2d at 134, 29 Wage & Hour Cas. at 610.

[7] Fair Labor Standards Amendments of 1966, § 102(a), (b), 80 Stat. 830, 831. The United States Supreme Court upheld the expansion of the Act in *Maryland v. Wirtz*, where the State of Maryland, joined by 27 other states brought action against the Secretary of Labor to enjoin the enforcement of the Act as applied to school and hospital workers. 392 U.S. 183, 187, 198–99 (1968). The Court reasoned that Congress was acting under its Commerce Clause powers and, thus, upheld the extension of § 207. *Id.* at 194, 198–99.

[8] Fair Labor Standards Amendments of 1974, § 6(a)(1) & (6), Pub. L. No. 93–259, 88 Stat. 55, 58, 60. In *National League of Cities v. Usery*, the United States Supreme Court overturned *Maryland v. Wirtz*, and held that the Commerce Clause does not give Congress authority to prescribe the labor practices of a state's own government agencies. National League of Cities v. Usury, 426 U.S. 833, 852, 855 (1976). *See Wirtz*, 392 U.S. at 194. In *National League of Cities*, a number of cities and states brought suit against the U.S. Secretary of Labor challenging the validity of the 1974 Amendments. 426 U.S. at 839. The Court, in a 5–4 decision, reasoned that the Tenth Amendment limits Congress's power to regulate a state's governing of traditional state activities. *Id.* at 842, 845. Thus, the Court held that Congress's extension of the FLSA to states was unconstitutional. *Id.* at 852. In 1985, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Supreme Court overturned *National League of Cities* and held that local transit municipal employees are entitled to the protection of the FLSA. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531, 555–56 (1985). *See National League of Cities*, 426 U.S. at 852. The Court reasoned that drawing distinctions between purely local functions that should be left to states and other functions subject to federal regulation conflicts with the ideals of American federalism. *Garcia*, 469 U.S. at 546–48. Thus, the Court concluded that requiring the transit authority to comply with the FLSA does not violate either state sovereignty or the Constitution. *Id.* at 554.

payments in certain situations.[9] Under § 207(o)(2)(A) of the Act, public employers can provide comp time pursuant to one of two provisions: subclause (i) enables employers to provide comp time pursuant to a collective bargaining agreement or any other agreement between the employer and the representatives of the employees;[10] subclause (ii), which can only be invoked when employees are not covered by subclause (i), allows employers to provide comp time when employees individually agree to such compensation before they begin work.[11]

The federal circuit courts soon disagreed about the scope of subclause (i)'s coverage.[12] Subclause (i) could be read as covering only those employees who had reached an "agreement" with their employer.[13] Thus, under the above interpretation, employees would not be covered if they never had a representative, or if they had a legal representative but that representative failed to reach agreement with the employer.[14] Alternatively, subclause (i) could be read as covering all employees who have a representative, regardless of whether that representative had reached an agreement or even whether or not the representative has the legal authority to enter into agreements.[15]

Attempting to interpret § 207(o)(2)(A), federal courts resorted to the statute's legislative history.[16] Senate Report 159 states that when employees do not have a "recognized representative," the employer can proceed directly to subclause (ii) and make individual agreements with individual employees.[17] House Report 331, however, indicates that the employees' representative "need not be a formal or recognized collective bargaining agent" as long as the employees have selected that

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[9] 29 U.S.C. § 207(o)(2)(A).

[10] *Id.*

[11] *Id.*

[12] *See, e.g.*, Dillard v. Harris, 885 F.2d 1549, 1553, 29 Wage & Hour Cas. 1520, 1522–23 (11th Cir. 1989), *cert. denied*, 498 U.S. 878, 29 Wage & Hour Cas. 1632 (1990); *Abbott*, 879 F.2d at 135, 29 Wage & Hour Cas. at 611; International Ass'n of Fire Fighters v. West Adams City Fire Protection Dist., 877 F.2d 814, 817–18, 29 Wage & Hour Cas. 542, 544–45 (10th Cir. 1989).

[13] *See International Ass'n of Fire Fighters*, 877 F.2d at 817 n.1, 29 Wage & Hour Cas. at 544 n.1.

[14] *See id.*

[15] *See id.*

[16] *See, e.g., Dillard*, 885 F.2d at 1553, 29 Wage & Hour Cas. at 1522–23; *Abbott*, 879 F.2d at 135, 29 Wage & Hour Cas. at 611; *International Ass'n of Fire Fighters*, 877 F.2d at 817–18, 29 Wage & Hour Cas. at 544–45.

[17] S. REP. NO. 159, 99th Cong., 1st Sess. 10 (1985), *reprinted in* 1985 U.S.C.C.A.N. 651, 658. Senate Report 159 states in pertinent part, "where employees do not have a recognized representative, the agreement of understanding must be between the employer and the individual employee." *Id.*

representative.[18] The Department of Labor regulation ("DOL Regulation"), which implements § 207(o), adopted the position of House Report 331, using nearly identical language.[19] On the other hand, in the Discussion of Major Comment accompanying the regulation, the Secretary of Labor recognized that different states would define an employees' "representative" differently, and stated the Department's intention to allow states to define "representative" for purposes of § 207(o)(2)(A).[20]

In June of 1989, in *International Association of Fire Fighters, Local 2203 v. West Adams City Fire Protection District*, the United States Court of Appeals for the Tenth Circuit held that an employer had to reach agreement under subclause (i) or pay overtime because its employees had designated a representative.[21] The court determined that the employer's refusal to recognize the representative did not permit the employer to bypass subclause (i).[22] In *International Association of Fire Fighters*, the International Association of Fire Fighters, Local 2203 ("Local 2203") represented a group of fire fighters who worked for the West Adams County Fire Protection District ("District").[23] Local 2203 attempted to negotiate overtime pay with the District, but when the parties did not reach an agreement, the District continued its practice of providing comp time only.[24] The Tenth Circuit determined that the language of § 207(o)(2)(A)(i) is ambiguous in that it is unclear whether "employee not covered in subclause (i)" refers to employees that do not have a *representative* or employees that do not have an *agreement* with the employer.[25] The court noted that Senate Report 159, by describing a "recognized representative," contradicted House Re-

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[18] H.R. REP. NO. 331, 99th Cong., 1st Sess. 20 (1985). House Report 331 states in pertinent part: "Where employees have selected a representative, which need not be a formal or recognized collective bargaining agent as long as it is a representative designated by the employees, the agreement or understanding must be between the representative and the employer." *Id.*

[19] 29 C.F.R. § 553.23(b)(1) (1993). The Department of Labor regulation, supporting the view of the House, states, in pertinent part, "In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." *Id.*

[20] Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed. Reg. 2012, 2014–15 (1987). The Secretary of Labor states, in pertinent part: "The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section [207(o)] shall be determined in accordance with State or local law and practices." *Id.*

[21] *International Ass'n of Fire Fighters*, 877 F.2d at 820, 29 Wage & Hour Cas. at 547.

[22] *Id.*

[23] *Id.* at 816, 29 Wage & Hour Cas. at 543.

[24] *Id.*

[25] *Id.* at 816–17, 29 Wage & Hour Cas. at 544. *See* 29 U.S.C. § 207(o)(2)(A) (1988).

port 331 and the DOL Regulation.[26] Nevertheless, the court concluded that in light of the DOL Regulation and House Report 331, both stating that the representative need not be formal or recognized, employees are represented if they merely designate a representative, even if the employer fails to recognize that person.[27] The court, therefore, held that the employer must bargain according to subclause (i) or pay overtime pursuant to the Act.[28]

The United States Court of Appeals for the Fourth Circuit, in July, 1989, reached a different conclusion in *Abbott v. City of Virginia Beach.*[29] In *Abbott*, the court held that when state law prohibits a state agency from collectively bargaining with the union, the agency may enter into individual agreements with employees pursuant to subclause (ii), without reaching an agreement with a labor union.[30] In *Abbott*, police officers in the City of Virginia Beach could choose either comp time or monetary compensation for each overtime shift worked.[31] The police officers alleged that this practice violated § 207(o) because the City had not bargained with the officers' designated representative.[32] The *Abbott* court reasoned that because the statute did not define the term "representative," the court was required to look to legislative history and administrative commentary.[33] Upon examination of the legislative history, the court noted that the DOL Regulation and House Report 331 indicated that the employer need not recognize the designated representative for employees to be covered under subclause (i).[34] The *Abbott* court, however, found more persuasive Senate Report 159 indicating the need for a "recognized representative," and the comment by the Secretary of Labor expressing the intent of § 207(o) to respect state law.[35] The court concluded that allowing public employers to enter into individual agreements pursuant to subclause (ii) fulfilled

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[26] *International Ass'n of Fire Fighters*, 877 F.2d at 819, 29 Wage & Hour Cas. at 546. *See* S. REP. No. 159, 99th Cong., 1st Sess. 10; H.R. REP. No. 331, 99th Cong., 1st Sess. 20; 29 C.F.R. § 553.23(b)(1).

[27] *International Ass'n of Fire Fighters*, 877 F.2d at 820, 29 Wage & Hour Cas. at 546–47. *See* H.R. REP. No. 331; 29 C.F.R. § 553.23(b)(1).

[28] *International Ass'n of Fire Fighters*, 877 F.2d at 820, 29 Wage & Hour Cas. at 547.

[29] Abbott v. City of Virginia Beach, 879 F.2d 132, 136, 29 Wage & Hour Cas. 609, 611–12 (4th Cir. 1989), *cert. denied*, 493 U.S. 1051, 29 Wage & Hour Cas. 1016 (1990). *See International Ass'n of Fire Fighters*, 877 F.2d at 820, 29 Wage & Hour Cas. at 547.

[30] *Abbott*, 879 F.2d at 136–37, 29 Wage & Hour Cas. at 612.

[31] *Id.* at 133, 29 Wage & Hour Cas. at 609.

[32] *Id.*

[33] *Id.* at 135, 29 Wage & Hour Cas. at 610.

[34] *Id.* at 135, 29 Wage & Hour Cas. at 611. *See supra* notes 18, 19 and accompanying text.

[35] *Abbott*, 879 F.2d at 136, 29 Wage & Hour Cas. at 611–12. *See supra* notes 17, 20 and accompanying text.

the policy of § 207(o) in light of the legislative history and the regulations.[36]

Following the *Abbott* decision, in September, 1989, the United States Court of Appeals for the Eleventh Circuit held in *Dillard v. Harris* that when state law prohibits collective bargaining, employees are not covered by subclause (i).[37] The *Dillard* court agreed with the reasoning of the *Abbott* decision, but provided an alternative analysis.[38] In *Dillard*, Georgia state hospital workers had designated a representative, but state law prohibited the employer from entering into agreements with the representative.[39] The court interpreted § 207(o)(2)(A)(i) as meaning that an agreement or understanding between the representative and the employer was a prerequisite to subclause (i) coverage.[40] The court reasoned that without any stated disagreement or consensus among the Houses of Congress, the plain meaning of the statute controls.[41] The court concluded that subclause (i) unambiguously refers to "representative employees," and because Georgia law prohibits collective bargaining, subclause (i) cannot apply.[42] Thus, the Court held that the employer could enter into individual agreements with the hospital workers over comp time.[43]

During the *Survey* year, the United States Supreme Court, in *Moreau v. Klevenhagen*, resolved the controversy among the federal circuits over the scope of subclause (i)'s coverage.[44] The Supreme Court unanimously held that subclause (i) covers employees with a designated representative who has the legal authority to enter into a collective bargaining agreement with the employer permitting the use of comp time.[45] The Court reasoned that this interpretation accords adequate significance to both the term "agreement" in subclause (i) and "employee" in subclause (ii).[46] Under *Moreau*, therefore, the em-

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[36] *Abbott*, 879 F.2d at 137, 29 Wage & Hour Cas. at 612.

[37] Dillard v. Harris, 885 F.2d 1549, 1556, 29 Wage & Hour Cas. 1520, 1525 (11th Cir. 1989), *cert. denied*, 498 U.S. 878, 29 Wage & Hour Cas. 1632 (1990).

[38] *Id.* at 1552, 29 Wage & Hour Cas. at 1522. *See Abbott*, 879 F.2d at 136, 29 Wage & Hour Cas. at 612.

[39] *Dillard*, 885 F.2d at 1551–52, 29 Wage & Hour Cas. at 1521–22.

[40] *Id.* at 1552, 29 Wage & Hour Cas. at 1522.

[41] *Id.*

[42] *Id.* at 1554, 29 Wage & Hour Cas. at 1524. *See* 29 U.S.C. § 207(o)(2)(A) (1988).

[43] *Dillard*, 885 F.2d at 1556, 29 Wage & Hour Cas. at 1525.

[44] Moreau v. Klevenhagen, 113 S. Ct. 1905, 1912, 1 Wage & Hour Cas. 2d 569, 574 (1993). *See, e.g., Dillard*, 885 F.2d at 1553, 29 Wage & Hour Cas. at 1523; *Abbott*, 879 F.2d at 135, 29 Wage & Hour Cas. at 611; International Ass'n of Fire Fighters v. West Adams City Fire Protection Dist., 877 F.2d 814, 817, 29 Wage & Hour Cas. 542, 544 (10th Cir. 1989).

[45] *Moreau*, 113 S. Ct. at 1912, 1 Wage & Hour Cas. 2d at 574.

[46] *Id.* at 1911, 1 Wage & Hour Cas. 2d at 573. *See* 29 U.S.C. § 207(o)(2)(A).

ployees' representative does not have to be recognized by the employer, but the representative must have the legal authority to enter into an agreement over comp time.[47]

The plaintiff in *Moreau* represented approximately 400 deputy sheriffs and served as president of the Harris County Deputy Sheriffs Union ("Union").[48] For several years, the Union represented the sheriffs of Harris County, Texas, ("County") in matters such as processing grievances and handling workers' compensation claims.[49] Texas law, however, prohibited the Union from entering into collective bargaining agreements with the County.[50] Each employee, therefore, signed his own employment agreement.[51] The agreements included a reference to the County regulation stating that the deputies would receive one and one half hours of comp time for each hour of overtime worked.[52]

In 1986, the Union brought action against the County alleging that the county had violated § 207(o)(2)(A) by paying comp time in lieu of overtime pay without an agreement with the Union.[53] The Union claimed to be the sheriffs' designated representative under subclause (i), and thus, maintained that the County was precluded from entering into individual agreements with its employees pursuant to subclause (ii).[54] The County contended that the Act unambiguously permitted individual agreements pursuant to subclause (ii) whenever

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[47] *Moreau*, 113 S. Ct. at 1912, 1 Wage & Hour Cas. 2d at 574.

[48] *Id.* at 1909, 1 Wage & Hour Cas. 2d at 571.

[49] *Id.*

[50] *Id. See* TEX. REV. CIV. STAT. ANN. art. 5154c § 1 (West 1947). Section 1 of the Texas law reads, in pertinent part:

> It is declared to be against the public policy of the State of Texas for any official or group of officials . . . of the State, to enter into a collective bargaining contract with a labor organization respecting the wages, hours, or conditions of employment of public employees, and any such contracts entered into after the effective date of this Act shall be null and void.

TEX. REV. CIV. STAT. ANN. art. 5154c.

[51] *Moreau*, 113 S. Ct. at 1909, 1 Wage & Hour Cas. 2d at 571.

[52] *Id.* at 1909, 1 Wage & Hour Cas. 2d at 571–72.

[53] *Id.* at 1909, 1 Wage & Hour Cas. 2d at 572. The Union also alleged that the County had wrongly failed to include longevity pay and certain firearms qualifications in computing overtime hours. Moreau v. Klevenhagen, 956 F.2d 516, 520–21, 30 Wage & Hour Cas. 1438, 1441–43 (5th Cir. 1992), *aff'd*, 113 S. Ct. 1905 (1993). The District Court granted summary judgment for the County on both claims. *Moreau*, 113 S. Ct. at 1909, n.12, 1 Wage & Hour Cas. 2d at 572, n.12. The Court of Appeals affirmed with respect the longevity claim and remanded with respect to the firearms claim. *Moreau*, 956 F.2d at 520–23, 30 Wage & Hour Cas. at 1441–44. Neither claim was at issue before the Supreme Court. *Moreau*, 113 S. Ct. at 1909, n.12, 1 Wage & Hour Cas. 2d at 572, n.12.

[54] *Moreau*, 113 S. Ct. at 1909, 1 Wage & Hour Cas. 2d at 572.

public employees do not have a collective bargaining agreement with their employer.[55]

The United States District Court for the Southern District of Texas granted summary judgment for the County.[56] The district court reasoned that normally, the designation of a union representative alone would render subclause (i) applicable, even absent public employer recognition of the representative; but the fact that Texas law prohibited collective bargaining rendered subclause (i) inapplicable.[57] Alternatively, the district court reasoned that subclause (i) did not cover the Union because it was not a "recognized" representative.[58] Accordingly, the district court held that the employer did not have to bargain with the representative of the employees pursuant to subclause (i).[59]

The United States Court of Appeals for the Fifth Circuit affirmed, relying largely on *Abbott* and *Dillard*.[60] The court reasoned that "employees not covered" in subclause (ii) referred to employees who did not have an agreement with their employer as opposed to employees who did not have a representative.[61] Therefore, because Texas law prohibited the county from ever entering into a bilateral agreement, whether the bargaining agent is a Union forming a collective bargaining agreement or not, the court found that subclause (i) could not be applicable.[62] Thus, the Fifth Circuit held that the County did not have to bargain with the representative pursuant to subclause (i), and could proceed directly to individual contracts under subclause (ii).[63]

The United States Supreme Court affirmed, holding that because the employees' representative did not have the legal authority to negotiate and agree with the employer on the use of comp time, the employer did not have to bargain pursuant to subclause (i).[64] The Court reasoned that such a reading accords adequate significance to both the words "agreement" in subclause (i) and "employee" in sub-

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[55] *Id.* at 1910, 1 Wage & Hour Cas. 2d at 572.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Moreau*, 113 S. Ct. at 1910, 1 Wage & Hour Cas. 2d at 572.

[60] *Moreau*, 956 F.2d at 519–20, 30 Wage & Hour Cas. at 1440–41. *See* Dillard v. Harris, 885 F.2d 1549, 1552, 29 Wage & Hour Cas. 1520, 1522 (11th Cir. 1989), *cert. denied*, 498 U.S. 878, 29 Wage & Hour Cas. 1632 (1990); Abbott v. City of Virginia Beach, 879 F.2d 132, 135, 29 Wage & Hour Cas. 609, 610 (4th Cir. 1989), *cert. denied*, 493 U.S. 1051, 29 Wage & Hour Cas. 1016 (1990).

[61] *Moreau*, 956 F.2d at 520, 30 Wage & Hour Cas. at 1441. *See* 29 U.S.C. § 207(o)(2)(A) (1988).

[62] *Moreau*, 956 F.2d at 520, 30 Wage & Hour Cas. at 1441.

[63] *Id.*

[64] *Moreau*, 113 S. Ct. at 1912, 1 Wage & Hour Cas. 2d at 573.

clause (ii).[65] The Court further reasoned that such an interpretation accords significance to the hierarchy of § 207(o), which favors subclause (i) agreements over the individual agreements of subclause (ii).[66] Accordingly, the Court held that the employees' representative need not be recognized by the employer as long as that person has the legal authority to bargain with the employer.[67]

The Supreme Court in *Moreau* began its discussion by pointing out the one proposition that neither party disputed: subclause (ii) authorizes individual agreements only when employees are not covered by subclause (i).[68] Thus, the Court attempted to identify the employees that subclause (i) intended to cover.[69] The Court noted, however, that this determination was problematic because subclause (i) does not purport to define a category of employees, but a category of agreements.[70]

The Court examined the County's argument that the shift in the subject of the clauses must mean that "employees" in subclause (i) refers only to those employees who are bound by a collective bargaining agreement.[71] The Court rejected this argument on two grounds.[72] First, citing *International Association of Firefighters*, the Court pointed out that grammatically, the reference in subclause (ii) to "employees" remained unmodified by subclause (i)'s focus on "agreement," and thus, subclause (ii) could just as easily refer to employees with agreements as employees with representatives.[73] Second, the Court noted that, under the County's argument, employees would have virtually no power with regard to subclause (i) because the employer need only reject any proposed "agreement" to reach subclause (ii).[74] The Court reasoned that if Congress had intended such an open-ended authorization of comp time, it would have written the Act more simply, without attempting to limit the use of individual agreements.[75]

After rejecting the County's argument, the Court scrutinized the Union's argument that "employees . . . covered by subclause (i)" referred to employees who have chosen a representative, regardless of

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[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 1910, 1 Wage & Hour Cas. 2d at 572.

[69] *Moreau*, 113 S. Ct. at 1910, 1 Wage & Hour Cas. 2d at 572.

[70] *Id.* at 1911, 1 Wage & Hour Cas. 2d at 572.

[71] *Id.* at 1910–11, 1 Wage & Hour Cas. 2d at 572. *See supra* note 55 and accompanying text.

[72] *Moreau*, 113 S. Ct. at 1911, 1 Wage & Hour Cas. 2d at 573. *See* 29 U.S.C. § 207(o)(2)(A) (1988).

[73] *Moreau*, 113 S. Ct. at 1911, 1 Wage & Hour Cas. 2d at 573.

[74] *Id.*

[75] *Id.*

whether that representative had the authority to enter into any sort of agreement.[76] The Court rejected the Union's interpretation as implausible.[77] On the one hand, the employer could not make individual agreements pursuant to subclause (ii) because the employee had designated a representative.[78] On the other hand, the employer could not bargain according to subclause (i) because bargaining with a Union is prohibited by Texas law.[79] Thus, under the Union's analysis, the employer would have to pay overtime because the employer could never reach subclause (ii), and state law precluded the use of subclause (i).[80]

The *Moreau* Court held that the phrase "employees . . . covered by subclause (i)" referred to employees with a designated representative who had the authority to negotiate, collectively bargain, and reach agreement with the employer over comp time.[81] The Court reasoned that this intermediate reading of the statute was consistent with the most reasonable reading of the DOL Regulation.[82] While the DOL Regulation statement that "the representative need not be a formal or recognized bargaining agent" could support the Union's argument, the Court found this interpretation implausible because representatives without the authority to bargain could preclude states from ever using comp time.[83] The Court accorded greater weight to the comment of the Secretary of Labor, which indicated that courts should defer to state law on the issue of whether states have a representative.[84]

The Court reasoned that the Act and the DOL Regulation are in harmony.[85] Employees are covered under subclause (i) when they designate a representative who has the *authority* to bargain.[86] Under the statute, such authority is necessary to reach an agreement.[87] Under the DOL Regulation, such authority is a condition of representative status.[88] Thus, the Court held that the employees in *Moreau* did not have a representative authorized to enter into an agreement with the employer regarding the use of comp time, and, therefore, the em-

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[76] *Id. See* 29 U.S.C. § 207(o)(2)(A).

[77] *Moreau*, 113 S. Ct. at 1911, 1 Wage & Hour Cas. 2d at 573.

[78] *Id.*

[79] *Id.*

[80] *See id.*

[81] *Id.* at 1912, 1 Wage & Hour Cas. 2d at 573. *See* 29 U.S.C. § 207(o)(2)(A).

[82] *Moreau*, 113 S. Ct. at 1912, 1 Wage & Hour Cas. 2d at 573.

[83] *Id.* at 1911, 1 Wage & Hour Cas. 2d at 573–74. *See* 29 C.F.R. § 553.23(b)(1) (1993).

[84] *Moreau*, 113 S. Ct. at 1912, 1 Wage & Hour Cas. 2d at 574. *See* Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed. Reg. 2012, 2014–15 (1987).

[85] *Moreau*, 113 S. Ct. at 1912, 1 Wage & Hour Cas. 2d at 574.

[86] *Id.*

[87] *Id.*

[88] *Id.*

ployer was entitled to go directly to subclause (ii) and come to agreement with individual employees.[89]

The *Moreau* Court concluded that in order for employees to be covered under subclause (i), they must have a designated representative who has the legal authority to enter into agreements with the employer over the use of comp time.[90] Even if the employer failed to recognize the representative, the employees could still be covered.[91] The Court reasoned that because Texas law prohibited the employer from collectively bargaining, however, the employees were not covered under subclause (i) because the ability to enter into agreements is a prerequisite to being a representative.[92]

In *Moreau*, the Supreme Court of the United States resolved the ambiguity over the coverage of § 207 (o)(2)(A).[93] The *Moreau* Court, however, analyzed the problem differently than those federal circuits that had previously addressed the issue.[94] The Court found its reading of the statute the only plausible one in light of the implications of alternative readings.[95] The reading of the Tenth Circuit in *International Association of Firefighters*, finding employees covered by subclause (i) if they simply designated a representative, would enable a Union, by virtue of its legal inability to enter into agreements with a State agency, to circumscribe § 207(o)(2)(A) entirely.[96] In effect, the Union would be in a better position because of the state law prohibition.[97] On the other hand, the interpretations of *Abbott* and *Dillard*, finding employees covered under subclause (i) only when their representative has an agreement with the employer, would circumscribe any bargaining power a Union may have.[98] The employer could simply refuse to enter into an "agreement" and thus, the employer could proceed to subclause (ii) in all cases.[99] The above interpretations would render

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[89] *Id.*

[90] *Moreau*, 113 S. Ct. at 1912, 1 Wage & Hour Cas. 2d at 573.

[91] *Id.* at 1911, 1 Wage & Hour Cas. 2d at 573.

[92] *Id.* at 1912, 1 Wage & Hour Cas. 2d at 574.

[93] *See id.* at 1912, 1 Wage & Hour Cas. 2d at 573.

[94] *Id.* at 1910, 1912, 1 Wage & Hour Cas. 2d at 572–73; Dillard v. Harris, 885 F.2d 1549, 1553, 29 Wage & Hour Cas. 1520, 1523 (11th Cir. 1989), *cert. denied*, 498 U.S. 878, 29 Wage & Hour Cas. 1632 (1990); Abbott v. City of Virginia Beach, 879 F.2d 132, 135, 29 Wage & Hour Cas. 609, 611 (4th Cir. 1989), *cert. denied*, 493 U.S. 1051, 29 Wage & Hour Cas. 1016 (1990); International Ass'n of Fire Fighters v. West Adams City Fire Protection Dist., 877 F.2d 814, 817, 29 Wage & Hour Cas. 542, 544 (10th Cir. 1989).

[95] *Moreau*, 113 S. Ct. at 1911, 1 Wage & Hour Cas. 2d at 573.

[96] *See International Ass'n of Fire Fighters*, 877 F.2d at 820, 29 Wage & Hour Cas. at 546–47.

[97] *See Moreau*, 113 S. Ct. at 1911, 1 Wage & Hour Cas. 2d at 573; *International Ass'n of Fire Fighters*, 877 F.2d at 820, 29 Wage & Hour Cas. at 546–47.

[98] *See Moreau*, 113 S. Ct. at 1911, 1 Wage & Hour Cas. 2d at 573; *Dillard*, 885 F.2d at 1556, 29 Wage & Hour Cas. at 1525; *Abbott*, 879 F.2d at 136, 29 Wage & Hour Cas. at 611.

[99] *See Moreau*, 113 S. Ct. at 1912, 1 Wage & Hour Cas. 2d at 574.

§ 207(o)(2)(A) moot.[100] While the legislative history is ambiguous, neither Congress nor the Secretary of Labor could have wanted to give one party, either union or management, the exclusive power to determine when subclause (i) will be applicable.[101]

The balancing test used in *Abbott* and *International Association of Firefighters*, weighing Senate Report 159 and the comment by the Secretary of Labor on the one hand and House Report 331 and the DOL Regulation on the other, inevitably led to divergent results among the federal circuits.[102] The Eleventh Circuit, in *Dillard*, attempted to alleviate this problem by simply asserting that the Act unambiguously requires an "agreement" when in reality, the Act lends itself to other interpretations.[103] The circuit courts failed to look beyond the facts of their cases to the policy behind the Act.[104] Congress created § 207(o)(2)(A) to provide states that could not necessarily afford to pay overtime with limited flexibility in choosing an alternative, provided their employees agreed to it, either through a representative or, alternatively, through individual employees.[105] By looking at the implications of various interpretations, rather than attempting to draw conclusions from contradictory House and Senate Reports, the Supreme Court has more thoroughly resolved the issue than previous courts.[106] While the *Moreau* decision turned on the fact that Texas law prohibited the Union from ever legally entering into agreements with the County, the Court's analysis prevents states without such laws from circumventing subclause (i) and going directly to subclause (ii) by simply never reaching agreement with the Union.[107] *Moreau* will likely prevent future divergent results among the circuit courts.[108]

The *Moreau* decision enables courts to consistently and logically interpret § 207(o)(2)(A), but the decision also provides states with the power to render § 207(o)(2)(A) practically moot.[109] States can simply pass laws making it illegal to bargain or reach agreement with the

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[100] *See Dillard*, 885 F.2d at 1556, 29 Wage & Hour Cas. at 1525; *Abbott*, 879 F.2d at 136, 29 Wage & Hour Cas. at 611; *International Ass'n of Fire Fighters*, 877 F.2d at 820, 29 Wage & Hour Cas. at 546–47.

[101] *See* S. REP. No. 159, 99th Cong., 1st Sess. 10 (1985), *reprinted in* 1985 U.S.C.C.A.N. 651, 658; H.R. REP. No. 331, 99th Cong., 1st Sess. 20 (1985). 29 C.F.R. § 553.23(b)(1) (1993).

[102] *See Abbott*, 879 F.2d at 135, 29 Wage & Hour Cas. at 610; *International Ass'n of Fire Fighters*, 877 F.2d at 820, 29 Wage & Hour Cas. at 546–47.

[103] *See Dillard*, 885 F.2d at 1552, 29 Wage & Hour Cas. at 1522.

[104] *See id.* at 1553, 29 Wage & Hour Cas. at 1523; *Abbott*, 879 F.2d at 135, 29 Wage & Hour Cas. at 610; *International Ass'n of Fire Fighters*, 877 F.2d at 820, 29 Wage & Hour Cas. at 546–47.

[105] *See* 29 U.S.C. § 207(o)(2)(A) (1988).

[106] *See Moreau*, 113 S. Ct. at 1911, 1 Wage & Hour Cas. 2d at 573.

[107] *See* 29 U.S.C. § 207(o)(2)(A); *Moreau*, 113 S. Ct. at 1912, 1 Wage & Hour Cas. 2d at 574.

[108] *See Moreau*, 113 S. Ct. at 1911, 1 Wage & Hour Cas. 2d at 573.

[109] *See id.*

employees' representative.[110] When states have such laws, public employers can proceed directly to subclause (ii), making agreements with employees individually before the commencement of work.[111] Since an unhired employee has virtually no bargaining power, an employee would likely always agree to the comp time provision.[112] The practical effect of *Moreau* leaves employees at the mercy of their state legislatures.[113] Although *Moreau* does not create new law, the decision does point out that § 207(o)(2)(A) is a severe cutback on the 1966 and 1972 Amendments of the Fair Labor Standards Act that made the Act applicable to public employees.[114]

The Supreme Court in *Moreau* resolved the ambiguity over the scope of employees covered in § 207(o)(2)(A)(i) by holding that employees must have a designated representative, and that representative must have the authority to negotiate and agree with the employer on provisions of a collective bargaining agreement regarding comp time.[115] The Court has left states the freedom to create law circumventing subclause (i).[116] States, however, without laws prohibiting public employers from entering agreements cannot circumvent subclause (i) by refusing to enter into agreements or refusing to recognize the employees' representative.[117] The Supreme Court decision enables courts to follow a consistent policy without attempting to interpret a murky legislative history.[118]

V. PREEMPTION

A. **NLRA Does Not Preempt an Otherwise Lawful Prehire Agreement When the State Acts as Market Participant:* Building & Construction Trades Council v. Associated Builders & Contractors[1]

In 1935, Congress passed the National Labor Relations Act ("NLRA") entrusting the nation's labor policy to a centralized federal

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[110] *See, e.g., Dillard*, 885 F.2d at 1553, 29 Wage & Hour Cas. at 1523; *Abbott*, 879 F.2d at 135, 29 Wage & Hour Cas. at 610.

[111] *See, e.g., Dillard*, 885 F.2d at 1552, 29 Wage & Hour Cas. at 1522.

[112] *See id.*

[113] *See Moreau*, 113 S. Ct. at 1911, 1 Wage & Hour Cas. 2d at 573.

[114] *See id.*

[115] *See id.* at 1912, 1 Wage & Hour Cas. 2d at 573.

[116] *See id.*

[117] *See* 29 U.S.C. § 207(o)(2)(A) (1988).

[118] *See Moreau*, 113 S. Ct. at 1912, 1 Wage & Hour Cas. 2d at 573.

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[1] 113 S. Ct. 1190, 142 L.R.R.M. 2649 (1993).

agency.[2] By acting in this area, Congress effectively preempted most state regulation of industrial relations.[3] Since the NLRA's passage, the United States Supreme Court has articulated two distinct preemption principles.[4] The first of these principles, the *Garmon* rule, protects the primary jurisdiction of the National Labor Relations Board ("NLRB") by forbidding state regulation of any activities that are either expressly, or even arguably, prohibited or protected by the NLRA.[5] The second preemption principle put forth by the Court, the *Machinists* preemption, prohibits state regulation in any area(s) that Congress left to the control of free market forces.[6]

In *San Diego Building Trades Council v. Garmon*, a 1959 case, the United States Supreme Court addressed whether the NLRA precluded a state court from awarding damages to an employer for economic injuries resulting from peaceful picketing by labor unions that had not been selected by employees as their agents.[7] The Court, noting that its decision was based on preventing conflict between federal and state policy, stated that Congress specifically entrusted the administration of labor policy to the NLRB.[8] Accordingly, the Court held that if a labor issue even arguably falls under the auspices of the NLRA, the state is preempted from acting.[9] Thus, the *Garmon* Court concluded that it was beyond the scope of the state court's jurisdiction to declare the union's activities an unfair labor practice and award damages.[10]

In 1976, in *Machinists v. Wisconsin Employment Relations Commission*, the United States Supreme Court articulated the second preemption principle, concluding that a state labor commission can not designate a concerted refusal by a union and its members to work overtime as an unfair labor practice.[11] The employer in *Machinists* filed a complaint with the Wisconsin Employment Relations Commission

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[2] National Labor Relations Act, 29 U.S.C. § 151 (1988). *See also* Wisconsin Dep't of Indus., Labor and Human Relations v. Gould, Inc., 475 U.S. 282, 289–90, 121 L.R.R.M. 2737, 2740 (1986).

[3] *Gould*, 475 U.S. at 286, 121 L.R.R.M. at 2739.

[4] Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 748, 119 L.R.R.M. 2569, 2579 (1985).

[5] *Id. See also* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244–45, 246, 43 L.R.R.M. 2838, 2841, 2842 (1959). The NLRB is the federal agency charged by Congress with the task of hearing, adjudicating and enforcing issues under the NLRA. *See id.* at 245, 119 L.R.R.M. at 2842.

[6] *Metropolitan Life*, 471 U.S. at 749–50, 119 L.R.R.M. at 2579–80. *See also* Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 140, 92 L.R.R.M. 2881, 2883–84 (1976).

[7] 359 U.S. at 237–38, 43 L.R.R.M. at 2838–39.

[8] *Id.* at 242, 43 L.R.R.M. at 2840.

[9] *Id.* at 245, 43 L.R.R.M. at 2842.

[10] *Id.* at 246, 43 L.R.R.M. at 2842.

[11] 427 U.S. at 155, 92 L.R.R.M. at 2889.

arguing that the union activity was an unfair labor practice.[12] The commission ruled that the union's refusal to work overtime constituted an unfair labor practice.[13] In response to the union's contention that the commission lacked jurisdiction over the labor issue, the commission stated that a refusal to work overtime is not an activity that is arguably protected by the NLRA, and thus, the commission was not preempted from asserting its jurisdiction.[14] The United States Supreme Court reversed this ruling, noting that even if an action does not specifically fall under the regulatory auspices of the NLRA, states are not necessarily free to regulate.[15] The *Machinists* Court held that Congress intended that some activities, such as the use of peaceful economic weapons in bargaining, be free from both federal and state regulation, and subject only to the free play of market forces.[16]

Applying the *Garmon* preemption principle in 1986, in *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, the United States Supreme Court held that the NLRA preempted a Wisconsin debarment statute.[17] The statute in question forbade state agents from purchasing any product from any person or firm that had violated the NLRA three times within a five-year period.[18] The state argued that the statute escaped preemption because it was an exercise of the state's spending, rather than regulatory, power.[19] Accordingly, the state urged that the Court create a "market participant" exception to NLRA preemption.[20] The Court, however, applying the *Garmon* rule, held that the statute served plainly as a means of enforcing the NLRA, and thus conflicted directly with the NLRB's jurisdiction.[21]

In dicta, the *Gould* Court stated that because Congress acted through the NLRA to entrust the administration of labor policy to the NLRB, the use of a market participant argument by a state in a labor issue may be altogether precluded.[22] The Court noted that because of Congress's direct action in the labor area, spending activities that may have been allowed under a Commerce Clause analysis are preempted by the NLRA.[23] The Court concluded that Congress did not intend to

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[12] *Id.* at 135, 92 L.R.R.M. at 2882.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 149, 155, 92 L.R.R.M. at 2887, 2889.
[16] *Machinists*, 427 U.S. at 150, 92 L.R.R.M. at 2887–88.
[17] 475 U.S. at 291, 121 L.R.R.M. at 2741.
[18] *Id.* at 283–84, 121 L.R.R.M. at 2738.
[19] *Id.* at 287, 121 L.R.R.M. at 2739.
[20] *Id.* at 289, 121 L.R.R.M. at 2740.
[21] *Id.* at 288, 121 L.R.R.M. at 2740.
[22] *See Gould*, 475 U.S. at 289–90, 121 L.R.R.M. at 2740.
[23] *Id.* at 290, 121 L.R.R.M. at 2740.

allow states to interfere with the "interrelated federal scheme of law, remedy and administration" under the NLRA by acting through their spending power.[24]

The Court also stated, however, that in some instances a state's purchasing decisions can be influenced by labor considerations.[25] The Court noted that some state spending powers may be of such a peripheral concern to the NLRA or so deeply rooted in local interest that preemption should not be inferred.[26] In any event, the *Gould* Court based its holding on the conclusion that the Wisconsin statute was a remedial regulation that directly conflicted with the *Garmon* principle protecting the primary jurisdiction of the NLRB over NLRA issues.[27] Thus, because the market participant discussion appeared only in dicta, the issue was left unresolved.[28]

During the *Survey* year, the market participant question was answered by the United States Supreme Court in *Building & Construction Trades Council v. Associated Builders & Contractors* [hereinafter *BCTC*].[29] The *BCTC* Court held that the NLRA did not preempt enforcement by a state authority acting as the owner of a construction project of an otherwise lawful prehire bargaining agreement.[30] The Court reasoned that the state organization entered into the lawful agreement as a private purchaser, not as a state entity attempting to regulate within the realm of the NLRA.[31] Accordingly, the Court determined that enforcement of the agreement was not preempted and established a market participant exception to NLRA preemption analysis.[32]

The *BCTC* dispute arose following a 1985 ruling in the District Court for the District of Massachusetts holding the Massachusetts Water Resources Authority ("MWRA") responsible for failing to prevent the pollution of Boston Harbor.[33] The district court in that case ordered the MWRA to clean the harbor "without interruption."[34] In

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[24] *Id.*

[25] *Id.* at 291, 121 L.R.R.M. at 2741.

[26] *Id.*

[27] *Gould*, 475 U.S. at 288, 121 L.R.R.M. at 2740.

[28] *See generally id.* at 289–91, 121 L.R.R.M. at 2740–41.

[29] 113 S. Ct. 1190, 1199, 142 L.R.R.M. 2649, 2655 (1993) [hereinafter *BCTC*].

[30] *Id.* at 1192, 1199, 142 L.R.R.M. at 2650, 2655.

[31] *Id.* at 1199, 142 L.R.R.M. at 2655.

[32] *See id.*

[33] *Id.* at 1192, 142 L.R.R.M. at 2650. *See also* United States v. Metropolitan Dist. Comm'n, 23 Env't Rep. Cas. (BNA) 1350, 1362–63 (D. Mass. 1985). The Massachusetts Water Resources Authority ("MWRA") is a state organization empowered by the legislature to provide water-supply and sewerage services to eastern Massachusetts. *BCTC*, 113 S. Ct. at 1192, 142 L.R.R.M. at 2650.

[34] *BCTC*, 113 S. Ct. at 1192, 142 L.R.R.M. at 2650.

the spring of 1988, the MWRA hired Kaiser Engineers, Inc. as the project manager of the cleanup effort.[35] In order to allow the project to proceed without interruption, Kaiser negotiated a prehire bargaining agreement with the Building and Construction Trades Council ("BCTC").[36]

Through this prehire agreement the MWRA sought to assure worksite harmony, labor/management peace and labor stability over the ten-year life of the project.[37] The negotiated agreement provided in part that BCTC was to be the exclusive bargaining agent of all employees, and that all employees would be subject to union security provisions, including the requirement that they become union members within seven days of employment.[38] The agreement also provided that employees would not strike for at least ten years, and that all contractors and subcontractors had to agree to be bound by the agreement.[39]

Such prehire agreements are normally illegal under the NLRA.[40] Due to certain conditions specific to the construction industry, however, Congress amended sections 8(e) and 8(f) of the NLRA in 1959 to allow these agreements.[41] In enacting these amendments, Congress

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[35] *Id.* at 1193, 142 L.R.R.M. at 2650.

[36] *Id.* at 1193, 142 L.R.R.M. at 2651.

[37] *Id.* at 1193, 142 L.R.R.M. at 2650–51.

[38] *Id.* at 1193, 142 L.R.R.M. at 2651.

[39] *BCTC*, 113 S. Ct. at 1193, 142 L.R.R.M. at 2651.

[40] National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1988).

[41] *BCTC*, 113 S. Ct. at 1198, 142 L.R.R.M. at 2654; National Labor Relations Act, 29 U.S.C. §§ 158(e) & (f) (1988). 29 U.S.C. § 158(e) (1988) provides, in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, that nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of construction, alteration, painting, or repair of a building, structure or other work . . . .

29 U.S.C. § 158(f) provides, in pertinent part:

> It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because . . . (2) such agreement requires as a condition of employment, membership in such labor organization . . ., or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives

focused on the short term nature of construction employment which makes post-hire bargaining difficult, the main contractors' need for predictable costs and a steady supply of skilled labor, and the long standing custom of such conduct in the industry.[42]

The MWRA approved and adopted the negotiated agreement in 1989 and incorporated it as a bid specification into its solicitation for bids.[43] In March of 1990, however, the Associated Builders and Contractors of Massachusetts/Rhode Island ("ABC"), an organization that represents non-union construction workers, brought several state and federal claims.[44] Among these claims was the charge that the MWRA, as a state organization, was preempted from acting within the federal area of labor relations.[45]

The District Court for the District of Massachusetts rejected the claims of ABC, and denied a preliminary injunction enjoining the solicitation for bids.[46] Addressing the NLRA claim of preemption the district court found that the harbor cleanup was a construction project, and concluded that the use of such prehire agreements in the construction industry is permitted by sections 8(e) and 8(f) of the NLRA.[47] The district court added that any effect the agreement may have had on NLRA bargaining conduct was outweighed by the local importance of a smooth, efficient clean-up effort.[48]

On appeal, the Court of Appeals for the First Circuit reversed the district court's decision.[49] The First Circuit reasoned that the state's intrusion into the labor arena was "all-pervasive," effectively eliminating the bargaining process altogether.[50] Accordingly, the First Circuit concluded that the NLRA preempted the agreement.[51]

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such labor organization an opportunity to refer qualified applicants for such employment . . . .

[42] *BCTC*, 113 S. Ct. at 1198, 142 L.R.R.M. at 2654.

[43] *Id.*

[44] *Id.* at 1193–94, 142 L.R.R.M. at 2651. Other than preemption under the NLRA, the original complaint by the Associated Builders and Contractors of Massachusetts/Rhode Island ("ABC") also alleged preemption under § 514(c) of the Employee Retirement Income Security Act ("ERISA"), violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, conspiracy to reduce competition in violation of the Sherman Act and various state-law claims. *Id.*

[45] *Id.*

[46] Associated Builders v. MWRA, 135 L.R.R.M. 2713, 2716 (1st Cir. 1990) [hereinafter *Associated Builders I*]. The district court rejected all of ABC's claims. *Id.* at 2721. The Court of Appeals for the First Circuit in reversing, however, felt that the NLRA preemption issue was dispositive. *Id.* Thus, that decision and all subsequent decisions have dealt only with NLRA preemption. *Id.*

[47] *Id.* at 2715.

[48] *Id.*

[49] *Id.* at 2721.

[50] *Id.* at 2718.

[51] *Associated Builders I*, 135 L.R.R.M at 2719.

The BCTC petitioned for an *en banc* rehearing, arguing that the MWRA entered into the agreement as a market participant to further proprietary, rather than regulatory, interests, and thus it fell within a preemption exception articulated by the Supreme Court in *Gould*.[52] Although the petition was granted, the Court of Appeals for the First Circuit again held that the agreement was preempted by the NLRA under both the *Garmon* rule and the *Machinists* preemption.[53] Addressing the question of a proprietary interest exception to NLRA preemption, the court concluded that the Supreme Court merely alluded to such an exception in *Gould*, but had never applied it to NLRA preemption.[54]

The United States Supreme Court granted certiorari, reversed the First Circuit's decision and held that the NLRA did not preempt the MWRA from enforcing the prehire agreement.[55] The Court reasoned that the MWRA entered into the lawful agreement as a market participant, with no regulatory intentions.[56] Accordingly, the Court determined that the agreement did not infringe upon the NLRB's jurisdiction.[57] The Court further concluded that the MWRA was not attempting to regulate in an area that Congress left to the control of market forces.[58] Thus, the Court held that the state action was preempted by neither the *Garmon* rule nor the *Machinists* principle.[59]

The Supreme Court began its discussion by examining what NLRA preemption of state law actually means.[60] The Court stated that such

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[52] Associated Builders v. MWRA, 935 F.2d 345, 349, 137 L.R.R.M. 2249, 2252 (1st Cir. 1991) [hereinafter *Associated Builders II*].

[53] *Id.* at 355, 137 L.R.R.M. at 2257.

[54] *Id.* In a dissenting opinion, however, Chief Judge Breyer, joined by Judge Campbell, argued that the intent of Congress is the paramount focus of a preemption analysis, and Congress had explicitly authorized prehire bargaining agreements between private parties in the construction industry. *Id.* at 361, 137 L.R.R.M at 2261 (Breyer, J., dissenting). Because the MWRA was effectively acting as a private purchaser of construction services, the dissent argued that the MWRA's actions did not conflict with the NLRA. *Id.* (Breyer, J., dissenting). Judge Breyer stressed that the *Gould* Court, when considering the state purchasing question, carefully considered the nature of the action and emphasized the lack of any legitimate relation between the Wisconsin statute and the state's proprietary interest. *Id.* at 365, 137 L.R.R.M at 2264 (Breyer, J., dissenting). In doing so, the dissent concluded, the Court based its decision on the finding that the state was not functioning as a private purchaser rather than on the basis that no market participant exception exists at all for NLRA preemption. *Id.* at 365, 137 L.R.R.M at 2265 (Breyer, J., dissenting).

[55] Building & Construction Trades Council v. Associated Builders & Contractors, 113 S. Ct. 1190, 1194, 1199, 142 L.R.R.M. 2649, 2652, 2655 (1993).

[56] *Id.* at 1199, 142 L.R.R.M. at 2655.

[57] *Id.*

[58] *Id.*

[59] *See id.*

[60] *BCTC*, 113 S. Ct. at 1196, 142 L.R.R.M. at 2653.

preemption means only that a state is prevented from "regulating" within the NLRA protected zones of the *Machinists* and *Garmon* principles.[61] The Court maintained, however, that merely because a state acts within one of these zones does not necessarily indicate that the state has performed a regulatory function.[62]

The Court rejected ABC's contention that *Gould* subjects a state to NLRA preemption principles regardless of whether the state is acting as a proprietor or a regulator.[63] The Court explained that the *Gould* decision indicated only that the Wisconsin statute at issue, although arguably proprietary in a sense, was not related to the contractual spending power of the state.[64] Consequently, the state was not functioning as a private purchaser.[65] The debarment statute in *Gould*, the *BCTC* Court explained, was clearly an attempt by the state to enforce the NLRA by remedial action, and thus, it was in direct conflict with the *Garmon* rule.[66] The *BCTC* Court added that *Gould* emphasized that in some circumstances state purchasing decisions could be influenced by labor considerations.[67]

Finally, the *BCTC* Court concluded that its decision was consistent not only with NLRA preemption principles but also with the legislative goals of Congress in enacting the construction industry exceptions in sections 8(e) and 8(f) of the NLRA, allowing such prehire agreements.[68] The Court noted that Congress enacted sections 8(e) and 8(f) in order to accommodate conditions specific to the construction in-

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[61] *Id.*

[62] *Id.* The Court explained, "[w]hen a State owns and manages property, for example, it must interact with private participants in the marketplace. In doing so, the State is not subject to preemption by the NLRA. . . ." *Id.*

[63] *Id.* at 1196–97, 142 L.R.R.M. at 2653. In support of their contention, ABC relied on the following passage from *Gould*:

> Nothing in the NLRA, of course, prevents private purchasers from boycotting labor law violators. But government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties. . . . The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference. . . . The act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play.

Id. at 1196, 142 L.R.R.M. at 2653 (quoting *Gould*, 475 U.S. at 290, 121 L.R.R.M. at 2740–41).

[64] *Id.* at 1197, 142 L.R.R.M. at 2653.

[65] *BCTC*, 113 S. Ct. at 1197, 142 L.R.R.M. at 2653.

[66] *Id.* at 1196, 142 L.R.R.M. at 2653.

[67] *Id.* at 1197, 142 L.R.R.M. at 2653–54. See also *Gould*, 475 U.S. at 291, 121 L.R.R.M. at 2741.

[68] *BCTC*, 113 S. Ct. at 1197, 142 L.R.R.M. at 2654. *See supra* note 41.

dustry.[69] The Court explained that there was no reason to expect that such conditions would change depending upon the public or private nature of the party doing the construction.[70] Thus, the Court determined, the intent of Congress is realized by the decision.[71]

In conclusion, the United States Supreme Court held in *Building & Construction Trades Council v. Associated Builders & Contractors* that the NLRA did not preempt the MWRA, acting as owner of a construction project, from enforcing an otherwise lawful prehire bargaining agreement.[72] In establishing this market participant exception to NLRA preemption, the Court emphasized the difference between a state acting as a private purchaser and a state acting with the intent to regulate through its spending power.[73] The *BCTC* Court held that the MWRA was acting as a private purchaser, with no intent to regulate, and thus, the market participant exception precluded preemption of the agreement.[74]

It is difficult to discern the precedent that the *BCTC* Court relies upon to support its holding. The *BCTC* Court purports to rely heavily on *Gould* to support its conclusion that a proprietary market participant exception exists in NLRA preemption.[75] The *Gould* Court, however, specifically stated, "we cannot believe that Congress intended to allow [s]tates to interfere with the interrelated federal scheme of law, remedy, and administration, under the NLRA as long as they [states] did so through exercise of the spending power."[76] The *Gould* Court stated that if a proprietary exception existed at all, it would exist only for spending powers that are of such a peripheral concern to the NLRA, or of such local interest, that preemption should not be inferred.[77] At no point in its opinion did the *BCTC* Court contend that the MWRA's actions escaped preemption because they were of a peripheral concern to the NLRA or were of extreme local interest.[78] How the Court could purport to rely so much on the *Gould* opinion, yet ignore these arguments is illogical.

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[69] *BCTC*, 113 S. Ct. at 1198, 142 L.R.R.M. at 2654.

[70] *Id.* at 1198, 142 L.R.R.M. at 2654–55.

[71] *Id.* at 1197–98, 142 L.R.R.M. at 2654.

[72] *Id.* at 1199, 142 L.R.R.M. at 2655.

[73] *Id.* at 1197, 142 L.R.R.M. at 2654.

[74] *BCTC*, 113 S. Ct. at 1199, 142 L.R.R.M. at 2655.

[75] *See id.* at 1196–97, 142 L.R.R.M. at 2653–54.

[76] *Gould*, 475 U.S. at 290, 121 L.R.R.M. at 2740.

[77] *Id.* at 291, 121 L.R.R.M. at 2741.

[78] *See supra* notes 60–74 and accompanying text. The district court, on the other hand, stated that the local interest of a speedy and efficient cleanup of Boston Harbor outweighed any NLRA preemption. *Associated Builders I*, 135 L.R.R.M. at 2715.

It is not contended that the conclusion reached by the Court is erroneous, but rather that the justifications offered by the Court lack precedential support. The *BCTC* Court emphasized that its holding was consistent with the legislative intent of Congress in enacting the construction industry exceptions in sections 8(e) and 8(f) of the NLRA, but the Court does not base its holding on this fact.[79] Instead the *BCTC* Court grounds its decision in its assertion that the MWRA was not acting as a regulator.[80] In order to rectify the *BCTC* opinion with past Supreme Court precedent, however, the opinion should not have been based on the premise that the MWRA was not regulating, but on the fact that they were acting within an area that Congress intended to treat differently than other areas of the NLRA.

Congress has seen fit to authorize exceptions to the NLRA for the construction industry because of certain conditions that are specific to that industry.[81] These exceptions are evidence that such conditions serve to create an area of labor regulation within the construction industry that is of such a peripheral concern to the NLRA and/or so deeply entrenched in local interest that preemption should not be inferred. Accordingly, the *BCTC* Court should have followed *Gould* by finding that a proprietary interest exception existed for the MWRA because Congress intended such prehire agreements in the construction industry to be considered as peripheral to the NLRA or of deep local interest.

As a practical matter, the *BCTC* decision now allows any state or municipality to act within the federal arena of labor relations.[82] As long as the state action is clearly proprietary and not regulatory in purpose, the state is free to function as any private purchaser would in the labor industry.[83] This is surely an advantage to states that wish to have control over the labor relations of projects in which they are involved. It is not clear, however, that the *BCTC* Court's decision is consistent with Congress's intent in passing the NLRA. Until Congress says something to the contrary, however, states are now free to engage in labor conduct from which they were previously preempted.[84]

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[79] *BCTC*, 113 S. Ct. at 1197–98, 1199, 142 L.R.R.M. at 2654–55.
[80] *Id.* at 1199, 142 L.R.R.M. at 2655.
[81] *Id.* at 1198, 142 L.R.R.M. at 2654.
[82] *See id.* at 1197, 142 L.R.R.M. at 2654.
[83] *Id.*
[84] *See BCTC*, 113 S. Ct. at 1197, 142 L.R.R.M. at 2654.

EMPLOYMENT DISCRIMINATION LAW

I. PROCEDURAL DEVELOPMENTS

A. **The Burden of Proof in Title VII Disparate Treatment Actions:* St. Mary's Honor Center v. Hicks[1]

Title VII of the Civil Rights Act of 1964 was enacted to prevent employers from discriminating against employees on the basis of race, color, religion, sex or national origin.[2] More specifically, Congress made it unlawful for an employer to discharge an employee because of the employee's race.[3] The practice of treating some employees less favorably than other employees on the basis of unlawful criteria is known as "disparate treatment."[4] In Title VII disparate treatment cases, an important issue is whether the factfinder's rejection of the articulated reasons proffered by the employer for its actions is sufficient to compel a judgment for the plaintiff.[5]

In 1973, in *McDonnell Douglas Corp. v. Green*, the United States Supreme Court held that the plaintiff in a Title VII case must be given a full and fair opportunity to demonstrate that the reasons articulated by the employer for its failure to rehire the plaintiff were in fact pretextual.[6] In *McDonnell Douglas*, Percy Green, an African-American mechanic, was rejected when he applied for re-employment with McDonnell Douglas on the ground that he had engaged in certain illegal conduct.[7] In arriving at its decision, the Court set forth a tripar-

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[1] 113 S. Ct. 2742, 62 Fair Empl. Prac. Cas. (BNA) 96 (1993).

[2] Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2(a)(1) (1976) provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

Id.

[3] *See id.*

[4] International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15, 14 Fair Empl. Prac. Cas. (BNA) 1514, 1519 n.15 (1977).

[5] St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2746, 62 Fair Empl. Prac. Cas. (BNA) 96, 98 (1993).

[6] 411 U.S. 792, 804, 805, 5 Fair Empl. Prac. Cas. (BNA) 965, 970 (1973).

[7] *Id.* at 794–96, 5 Fair Empl. Prac. Cas. (BNA) at 966. Green had worked for McDonnell Douglas for approximately eight years when he was laid off as part of a general reduction in the company's workforce. *Id.* at 794, 5 Fair Empl. Prac. Cas. (BNA) at 966. Green and others protested

tite standard for the allocation of the burden of proof in Title VII cases.[8] The first part of the tripartite standard required the plaintiff, Green, to satisfy his burden of establishing a prima facie case for discrimination.[9] Then, in response to the plaintiff's prima facie case for discrimination, the employer, McDonnell Douglas, satisfied the second prong of the tripartite standard by articulating some legitimate, nondiscriminatory reason for the employee's rejection.[10] Finally, the Court established the third prong of the tripartite standard which required the Court to provide the Title VII plaintiff with an opportunity to show that the reasons proffered by the defendant for the plaintiff's rejection, while facially valid, were in fact pretextual.[11] The Supreme Court held that Green had not had this opportunity, and thus remanded the case to the district court for this determination.[12]

Then, in 1978, in *Furnco Construction Corp. v. Waters*, the United States Supreme Court held that to satisfy the second prong of the *McDonnell Douglas* tripartite standard, the employer need only articulate some legitimate nondiscriminatory reason for the applicant's rejection in order to rebut the plaintiff's prima facie case for employment discrimination.[13] In *Furnco*, three African-American bricklayers sued an

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his original discharge and what they perceived to be racially motivated general hiring procedures by stalling their cars on roads leading to the McDonnell Douglas plant. *Id.* Green was arrested and subsequently fined for his involvement in obstructing traffic. *Id.* at 795, 5 Fair Empl. Prac. Cas. (BNA) at 966. Other illegal activities took place in which Green may have been involved. *See McDonnell Douglas*, 411 U.S. at 795, 5 Fair Empl. Prac. Cas. (BNA) at 966. Following these events, Green applied for re-employment in response to an advertisement by McDonnell Douglas. *Id.* at 796, 5 Fair Empl. Prac. Cas. (BNA) at 966. Following his rejection, Green filed a formal complaint with the EEOC including the charge that McDonnell Douglas had failed to rehire him because of his race. *Id.* When this was unsuccessful, Green brought an action under Title VII. *See id.* at 797, 5 Fair Empl. Prac. Cas. (BNA) at 966–67.

[8] *See id.* at 802–04, 5 Fair Empl. Prac. Cas. (BNA) at 969–70.

[9] *McDonnell Douglas*, 411 U.S. at 802, 5 Fair Empl. Prac. Cas. (BNA) at 969. To establish a prima facie case for discrimination, the plaintiff must show that: 1) the plaintiff belongs to a racial minority; 2) the plaintiff applied for a job for which he or she was qualified; 3) the plaintiff was rejected, despite his or her qualifications and 4) the employer continued seeking other applicants for the job after the plaintiff's rejection. *Id.*

[10] *Id.* at 802–03, 5 Fair Empl. Prac. Cas. (BNA) at 969. McDonnell Douglas cited Green's participation in illegal conduct against it as the legitimate cause for his rejection. *Id.* at 803, 5 Fair Empl. Prac. Cas. (BNA) at 969.

[11] *Id.* at 804, 5 Fair Empl. Prac. Cas. (BNA) at 970.

[12] *See McDonnell Douglas*, 411 U.S. at 807, 5 Fair Empl. Prac. Cas. (BNA) at 971.

[13] 438 U.S. 567, 578, 17 Fair Empl. Prac. Cas. (BNA) 1062, 1066 (1978) (quoting *McDonnell Douglas*, 411 U.S. at 802, 5 Fair Empl. Prac. Cas. (BNA) at 969). The employer did not have to show that it used a special hiring procedure to maximize the number of minority employees. *Id.* at 577–78, 17 Fair Empl. Prac. Cas. (BNA) at 1066. *See also* Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25, 18 Fair Empl. Prac. Cas. (BNA) 520, 521 (1978) (per curiam) (holding that to rebut a plaintiff's prima facie case for discrimination, and therefore satisfy the second prong of the *McDonnell Douglas* standard, the employer need only articulate some

employer who had allegedly discriminated against them by not hiring them on the basis of their race.[14] The Court reasoned that the prima facie case creates an inference of discrimination because the alleged acts, in the absence of any explanation, are more likely than not based on impermissible factors.[15] According to the Court, the employer must be allowed some latitude, however, to introduce evidence bearing on its motive, because a prima facie case is not equivalent to a finding of fact.[16] The Court concluded that the Court of Appeals for the Seventh Circuit erred in requiring an employer to do more than articulate legitimate reason for the employer's actions in order to rebut the prima facie case of the plaintiff.[17]

In 1981, in *Texas Department of Community Affairs v. Burdine*, the United States Supreme Court clarified further the standard of proof for the second prong of the *McDonnell Douglas* tripartite analysis.[18] In a unanimous decision, the *Burdine* Court held that the employer bears only the burden of producing evidence which explains clearly the nondiscriminatory reasons for its actions, in order to rebut the plaintiff's prima facie case for discrimination.[19] The Court held that at the second prong of the tripartite standard the employer bears no burden of *persuading* the court by a preponderance of evidence that its action was actually motivated by a legitimate, nondiscriminatory reason.[20] In *Burdine*, a woman claimed that her termination by the defendant employer was based on gender discrimination, in violation of Title VII.[21] The Court reasoned that establishment of a prima facie case in effect created a presumption that the employer unlawfully discriminated against the employee.[22] According to the Court, when a pre-

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legitimate, nondiscriminatory reason for rejection). The *Sweeney* Court reasoned that if the burden was on the defendant to prove the absence of discriminatory motive, the third prong of the tripartite standard, giving the plaintiff the opportunity to show the defendant's reasons to be pretextual, would be superfluous. *See id.* at 24 n.1, 18 Fair Empl. Prac. Cas. (BNA) at 521 n.1.

[14] *See Furnco*, 438 U.S. at 569, 17 Fair Empl. Prac. Cas. (BNA) at 1063.

[15] *Id.* at 577, 17 Fair Empl. Prac. Cas. (BNA) at 1066.

[16] *Id.* at 579–80, 17 Fair Empl. Prac. Cas. (BNA) at 1067.

[17] *See id.* at 577–78, 17 Fair Empl. Prac. Cas. (BNA) at 1066.

[18] *See* 450 U.S. 248, 254–55, 25 Fair Empl. Prac. Cas. (BNA) 113, 116 (1981).

[19] *See id.*

[20] *Id.* at 254, 25 Fair Empl. Prac. Cas. (BNA) at 116. *See also* Joan K. Fine, *Standard for Rebutting a Prima Facie Title VII Violation:* Texas Department of Community Affairs v. Burdine, *1980–81 Annual Survey of Labor and Employment Law*, 23 B.C. L. REV. 268, 268, 270 (1981).

[21] *Id.* at 251, 25 Fair Empl. Prac. Cas. (BNA) at 114.

[22] *Id.* at 254, 25 Fair Empl. Prac. Cas. (BNA) at 116. Also, the Federal Rules of Evidence provide in pertinent part:

> [A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift

sumption of discrimination has been created, the defendant's rebuttal is sufficient if it raises a genuine issue of fact as to whether the defendant discriminated against the plaintiff.[23] The Court stated that the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.[24]

According to the *Burdine* Court, if the defendant is successful in rebutting the plaintiff's prima facie case, the factual inquiry as to whether the defendant's articulated reasons for its actions are pretextual proceeds to a new level of specificity.[25] The Court noted that at the third prong of the *McDonnell Douglas* tripartite analysis, after the employer's rebuttal, the plaintiff's burden of demonstrating the proffered reasons to be pretextual "merges" with the plaintiff's ultimate burden of persuading the court that she has been the victim of intentional discrimination.[26] The Court concluded that the plaintiff may succeed in persuading the court that she has been the victim of intentional discrimination either directly by showing that a discriminatory reason motivated the employer or indirectly by showing that the employer's proffered reason is not credible.[27]

In 1983, in *United States Postal Service Board of Governors v. Aikens*, the United States Supreme Court held that the presumption of discrimination drops from the case once the defendant has successfully rebutted the plaintiff's prima facie case for discrimination.[28] According to the Court, following the defendant's rebuttal, the factfinder must then decide the ultimate question of whether the defendant intentionally discriminated against the plaintiff.[29] In *Aikens*, an African-American

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> to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

FED. R. EVID. 301.

[23] *Burdine*, 450 U.S. at 254, 25 Fair Empl. Prac. Cas. (BNA) at 116.

[24] *Id.* at 253, 25 Fair Empl. Prac. Cas. (BNA) at 115.

[25] *Id.* at 255, 25 Fair Empl. Prac. Cas. (BNA) at 116.

[26] *See id.* at 256, 25 Fair Empl. Prac. Cas. (BNA) at 116.

[27] *Id.* The Supreme Court vacated the decision of the Court of Appeals of the Fifth Circuit, which required proof of legitimate reasons by a preponderance of evidence at the second stage of the *McDonnell Douglas* analysis, requiring that the evidence produced by the defendant only be clear and "reasonably specific." *Burdine*, 450 U.S. at 258, 259–60, 25 Fair Empl. Prac. Cas. (BNA) at 117, 118. Requiring only the articulation of reasonably specific reasons, and not proof by a preponderance of the evidence at this second prong of the *McDonnell Douglas* analysis, will suffice to rebut the inferences created by the plaintiff's prima facie case for discrimination, as well as afford the plaintiff a full and fair opportunity to demonstrate pretext. *See id.* at 258, 25 Fair Empl. Prac. Cas. (BNA) at 117.

[28] *See* 460 U.S. 711, 715, 31 Fair Empl. Prac. Cas. (BNA) 609, 611 (1983).

[29] *Id.* at 715, 31 Fair Empl. Prac. Cas. (BNA) at 611.

employee of the United States Postal Service sued under Title VII after allegedly being turned down for a promotion on the basis of his race.[30] The Court reasoned that the *McDonnell Douglas* tripartite standard was never intended to be rigid or mechanized.[31] According to the *Aikens* Court, after the employer has rebutted the plaintiff's prima facie case for discrimination, under the analysis set forth in *McDonnell Douglas* and *Burdine*, the factfinder must then determine whether the employer's action was discriminatory.[32] The Court held that after evidence has been presented to satisfy the first two prongs of the tripartite standard, the factfinder must determine which party's explanation of the employer's motivation it believes.[33] The Supreme Court held that the district court erred in requiring direct evidence of discriminatory intent from the plaintiff when determining whether the employer had discriminated against the plaintiff.[34]

During the *Survey* year, in *St. Mary's Honor Center v. Hicks*, the United States Supreme Court addressed whether a rejection of the employer's proffered reason for its actions requires a judgment for the plaintiff.[35] The Court held that a trier of fact's rejection of an employer's asserted legitimate, nondiscriminatory reasons for its challenged actions does not compel, though it may permit, judgment for the plaintiff.[36] Consequently, after *Hicks*, it is more difficult for Title VII plaintiffs to succeed in the absence of tangible evidence of discrimination.[37]

Melvin Hicks ("Hicks"), an African-American man, was a shift commander at St. Mary's Honor Center ("St. Mary's"), a halfway house operated by the Missouri Department of Corrections and Human Resources ("MDCHR").[38] After Hicks had enjoyed a satisfactory employment record for several years, MDCHR assigned new supervisors to oversee his work.[39] Thereafter, he was repeatedly and severely disci-

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[30] *Id.* at 712, 31 Fair Empl. Prac. Cas. (BNA) at 610.

[31] *Id.* at 715, 31 Fair Empl. Prac. Cas. (BNA) at 611 (citing *Furnco*, 438 U.S. at 577, 17 Fair Empl. Prac. Cas. (BNA) at 1066).

[32] *Id.* at 715, 31 Fair Empl. Prac. Cas. (BNA) at 611.

[33] *Aikens*, 460 U.S. at 716, 31 Fair Empl. Prac. Cas. (BNA) at 611. The *Aikens* Court appears to have dropped the third prong of the *McDonnell Douglas* tripartite standard, when it implied that the factfinder must base its decision on the evidence presented in the first two prongs. *See id.*

[34] *Id.* at 717, 31 Fair Empl. Prac. Cas. (BNA) at 611.

[35] St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2746, 62 Fair Empl. Prac. Cas. (BNA) 96, 98 (1993).

[36] *Id.* at 2748–49, 62 Fair Empl. Prac. Cas. (BNA) at 100–01.

[37] See *infra* notes 88–94 and accompanying text.

[38] *Hicks*, 113 S. Ct. at 2746, 62 Fair Empl. Prac. Cas. (BNA) at 98.

[39] *Id.*

plined for rule violations by his subordinates, for failing to adequately investigate a brawl, and for failing to ensure that his subordinates signed a log book when using St. Mary's vehicles.[40] These events resulted in his demotion and, following a threat to his immediate supervisor, his discharge.[41] As a result of these events, Hicks brought suit in the United States District Court for the Eastern District of Missouri, alleging that St. Mary's had unlawfully discriminated against him in violation of Title VII.[42]

The District Court found for St. Mary's.[43] The court concluded that Hicks had satisfied the minimal requirements of a prima facie case under *McDonnell Douglas*.[44] Under the *McDonnell Douglas* tripartite standard, the burden then fell on St. Mary's to rebut the presumption of discrimination.[45] St. Mary's introduced evidence of legitimate and nondiscriminatory reasons for its actions, namely the severity and the accumulation of rules violations committed by Hicks.[46] Under the final prong of the *McDonnell Douglas* analysis, Hicks was able to prove that the reasons given by St. Mary's were pretextual.[47] The district court found that Hicks was the only person disciplined for violations committed by his subordinates, while other shift commanders went unpunished.[48] The district court noted, however, that even though the plaintiff proved pretext, he still bore the ultimate burden of proving that race was the determining factor in his employer's decision.[49] Accordingly, the court found that even though Hicks had demonstrated that he was being disciplined more harshly than his co-workers, it was not clear that his race, as opposed to personal animus, was the motivation behind the discipline.[50] Thus, the district court held in favor of St. Mary's on the Title VII complaint.[51]

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[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] Hicks v. St. Mary's Honor Center, 756 F. Supp. 1244, 1253, 55 Fair Empl. Prac. Cas. (BNA) 131, 139 (E.D. Mo. 1991), *rev'd*, 970 F.2d 487, 59 Fair Empl. Prac. Cas. (BNA) 588 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2742, 62 Fair Empl. Prac. Cas. (BNA) 96 (1993).

[44] *Hicks*, 756 F. Supp. at 1249, 55 Fair Empl. Prac. Cas. (BNA) at 136. The court found a prima facie case for discrimination was established because Hicks showed (1) that he was black, (2) that he was qualified for his position, (3) that he was demoted from that position and ultimately discharged and (4) that the position remained opened and was eventually filled by a white man. *Id.* at 1249–50, 55 Fair Empl. Prac. Cas. (BNA) at 136.

[45] *Id.* at 1250, 55 Fair Empl. Prac. Cas. (BNA) at 136.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Hicks*, 756 F. Supp. at 1251, 55 Fair Empl. Prac. Cas. (BNA) at 137.

[50] *Id.* at 1251, 1252, 55 Fair Empl. Prac. Cas. (BNA) at 137.

[51] *Id.* at 1253, 55 Fair Empl. Prac. Cas. (BNA) at 139.

On appeal, the United States Court of Appeals for the Eighth Circuit reversed the lower court's decision.[52] The Eighth Circuit held that once Hicks had presented evidence that St. Mary's proffered reasons were pretextual, he was not required to present any additional evidence of racial motivation.[53] The court reasoned that because St. Mary's was in no better position than if it had remained silent, Hicks was entitled to judgment as a matter of law.[54]

In a five to four decision, the United States Supreme Court reversed the Court of Appeals decision by holding that the plaintiff must show not only that the employer's proffered reasons for its actions were pretextual, but also that the real reason for the employer's action was discriminatory.[55] According to the Court, once the presumption of discrimination has been rebutted with a legitimate reason proffered by the employer for its actions, the *McDonnell Douglas* framework is no longer relevant, and the presumption of discrimination is dropped from the case.[56] Accordingly, the remaining question for the trier of fact is whether the plaintiff has proven that the defendant has intentionally discriminated against him because of his race.[57]

The Court further held, however, that rejection of the defendant's proffered reasons for its actions will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.[58] A factfinder's disbelief of a defendant's articulated reasons together with the elements of the plaintiff's prima facie case may suffice to show discrimination.[59] The Court faulted the Eighth Circuit's holding that a rejection of the proffered reasons *compels* judgment for the plaintiff, reiterating that at all times a Title VII plaintiff bears the "ultimate burden of persuasion."[60] Therefore, according to the Court, a finding of pretext of the employer's articulated, legitimate reasons does not automatically constitute a finding of discrimination.[61] The Court further reasoned that

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[52] Hicks v. St. Mary's Honor Center, 970 F.2d 487, 493, 59 Fair Empl. Prac. Cas. (BNA) 588, 593 (8th Cir. 1992). The Eighth Circuit directed the District Court to enter judgment for Hicks, but remanded the case for further findings on the remaining issues, including damages. *Id.*

[53] *Id.* at 493, 59 Fair Empl. Prac. Cas. (BNA) at 593.

[54] *See id.* at 492, 59 Fair Empl. Prac. Cas. (BNA) at 592.

[55] *See Hicks*, 113 S. Ct. at 2752, 2754, 62 Fair Empl. Prac. Cas. (BNA) at 102, 104.

[56] *Id.* at 2749, 62 Fair Empl. Prac. Cas. (BNA) at 100. The Court stated that the determination that the employer has met its burden of production of a legitimate reason for its actions can involve no credibility assessment. *Id.* at 2748, 62 Fair Empl. Prac. Cas. (BNA) at 100. At this stage, the employer's nondiscriminatory reasons are taken as true. *Id.*

[57] *Id.* at 2749, 62 Fair Empl. Prac. Cas. (BNA) at 100 (quoting *Burdine*, 450 U.S. at 253, 25 Fair Empl. Prac. Cas. (BNA) at 115).

[58] *Hicks*, 113 S. Ct. at 2749, 62 Fair Empl. Prac. Cas. (BNA) at 100.

[59] *Id.*

[60] *Id.* at 2749, 62 Fair Empl. Prac. Cas. (BNA) at 100–01.

[61] *See id.* at 2749 n.4, 62 Fair Empl. Prac. Cas. (BNA) at 100 n.4. The Court stated that, "[e]ven

a finding that the employer's action was the product of unlawful discrimination is quite different from a finding that the employer's explanation of its action was not believable.[62] According to the Court, if a plaintiff shows an employer's proffered reason for an action to be pretextual, the plaintiff is not necessarily proving that discrimination was the real reason.[63]

By applying the Court's interpretation of *Burdine*, the majority next addressed the dissent's position, which required only that a plaintiff show the employer's reasons to be pretextual in order to prove discrimination.[64] The Court stated that the plaintiff must do more than simply show that the employer's asserted reasons for its actions were false in order to prove by a preponderance of the evidence that the reasons offered by the employer were a pretext for discrimination.[65] According to the majority, in order to prove that the employer's reason for its action was a pretext for discrimination, the plaintiff must show both that the reasons were false, *and* that discrimination was the real reason.[66] The Court thus concluded that the "merger" discussed in *Burdine* consists of the proof that the employer's reason was false combined with the more difficult proof that the real reason was discrimination.[67] The Court further interpreted the "new level of specificity" at this prong, as requiring a turn from the generalized factors of the prima facie case to the specific proofs and rebuttals of discriminatory motivation.[68]

The Court agreed with the dissent that according to the particular wording of one sentence in *Burdine*, the falsity of the employer's explanation alone is enough to compel judgment for the plaintiff.[69] The Court, however, dismissed this statement as an "inadvertence," a

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though rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*" *Id.*

[62] *Hicks*, 113 S. Ct. at 2751, 62 Fair Empl. Prac. Cas. (BNA) at 102.

[63] *See id.* at 2749 n.4, 2751, 62 Fair Empl. Prac. Cas. (BNA) at 100 n.4, 102.

[64] *See id.* at 2751–53, 62 Fair Empl. Prac. Cas. (BNA) at 102–04.

[65] *Id.* at 2751–52, 62 Fair Empl. Prac. Cas. (BNA) at 102. In other words, to find for the plaintiff, the factfinder must find that the articulated reasons were a pretext *for discrimination*, not merely lies or a pretext for some other reason. *See id.* at 2752, 62 Fair Empl. Prac. Cas. (BNA) at 102.

[66] *Hicks*, 113 S. Ct. at 2752, 62 Fair Empl. Prac. Cas. (BNA) at 102.

[67] *Id.* at 2752, 62 Fair Empl. Prac. Cas. (BNA) at 103.

[68] *Id.* at 2752, 62 Fair Empl. Prac. Cas. (BNA) at 102–03 (quoting *Burdine*, 450 U.S. at 255, 25 Fair Empl. Prac. Cas. (BNA) at 116).

[69] *Id.* at 2752, 62 Fair Empl. Prac. Cas. (BNA) at 103 (citing *Burdine*, 450 U.S. at 256, 25 Fair Empl. Prac. Cas. (BNA) at 116 (holding plaintiff may prove he or she was victim of intentional discrimination, "*either* directly by persuading the court that a discriminatory reason more likely motivated the employer *or* indirectly by showing that the employer's proffered explanation is unworthy of credence" (emphasis added))).

dictum that was inconsistent with the rest of *Burdine*.[70] The Court further noted that it is not enough for the factfinder to disbelieve the employer; the factfinder must believe the plaintiff's assertions of discrimination.[71]

The Court finally addressed the potential consequences of its decision.[72] The Court noted that there is no justification for assuming that those employers whose evidence in the rebuttal prong is disbelieved are perjurers or liars.[73] The Court concluded that if there is any perjury, it can be properly addressed outside of a Title VII proceeding.[74] According to the Court, the essence of Title VII is not to punish employers who cannot prove a nondiscriminatory reason for adverse employment action, but to award damages against those employers who are proven to have taken adverse employment action based on, inter alia, race.[75]

The dissent, relying heavily on *Burdine*, argued that the plaintiff need only prove that the reasons articulated by the employer are pretextual in order to succeed on a claim of discrimination.[76] The dissent contended that the defendant's burden of production requires the employer to frame the factual issue with sufficient clarity so that the plaintiff will have full and fair opportunity to demonstrate pretext.[77] The dissent interpreted *Burdine*'s merger language as giving a plaintiff two options: either showing discrimination by the employer *or*

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[70] *Id.* at 2753, 62 Fair Empl. Prac. Cas. (BNA) at 103–04 (discussing *Burdine*, 450 U.S. at 256, 25 Fair Empl. Prac. Cas. (BNA) at 116). For examples of such inconsistent statements in *Burdine*, *compare* 450 U.S. at 253, 256, 25 Fair Empl. Prac. Cas. (BNA) at 115, 116 (holding burden of persuading trier of fact that defendant intentionally discriminated against plaintiff remains with plaintiff at all times) *with* 450 U.S. at 256, 25 Fair Empl. Prac. Cas. (BNA) at 116 (holding plaintiff's showing employer's proffered explanation is unworthy of credence enough for factfinder to find for plaintiff, even though plaintiff has not shown defendant intentionally discriminated).

The Court further stated that any confusion caused by the language in *Burdine*, indicating that the falsity of the employer's explanation alone is enough to compel judgment for the plaintiff, was resolved in *Aikens*, when the Court held that the factfinder must decide whether the rejection of the plaintiff was discriminatory within the meaning of Title VII, not merely whether the evidence offered by the defendant was credible. *Hicks*, 113 S. Ct. at 2753, 62 Fair Empl. Prac. Cas. (BNA) at 104 (citing *Aikens*, 460 U.S. at 714–15, 31 Fair Empl. Prac. Cas. (BNA) at 611).

[71] *Hicks*, 113 S. Ct. at 2754, 62 Fair Empl. Prac. Cas. (BNA) at 104.

[72] *See id.* at 2754–56, 62 Fair Empl. Prac. Cas. (BNA) at 104–06.

[73] *Id.* at 2754, 62 Fair Empl. Prac. Cas. (BNA) at 104.

[74] *Id.* at 2754, 62 Fair Empl. Prac. Cas. (BNA) at 105.

[75] *Id.* at 2756, 62 Fair Empl. Prac. Cas. (BNA) at 106.

[76] *See Hicks*, 113 S. Ct. at 2760–61, 62 Fair Empl. Prac. Cas. (BNA) at 109–10.

[77] *Id.* at 2759, 62 Fair Empl. Prac. Cas. (BNA) at 108 (quoting *Burdine*, 450 U.S. at 255–56, 25 Fair Empl. Prac. Cas. (BNA) at 116).

showing that the employer's proffered reasons are unworthy of credence.[78] According to the dissent, either of these showings is sufficient to establish a pretext for discrimination and, thus, entitles the plaintiff to judgment.[79] The majority had interpreted this language as requiring *both* a showing of discrimination *and* incredibility of proffered reasons.[80]

According to the dissent, the Court unfairly held that the plaintiff must disprove all reasons suggested by the employer, no matter how vaguely, in the record.[81] Under the majority's analysis, the factfinder may find nondiscriminatory reasons for the employer's actions anywhere in the record, making it extremely difficult for the plaintiff to prove all the possible reasons to be pretextual.[82] The dissent argued that requiring more than a showing of pretext of articulated reasons increases the burden on the plaintiff in the third prong of the *McDonnell Douglas* tripartite analysis.[83] According to the dissent, by requiring the plaintiff to demonstrate that reasons not articulated by the employer, but discerned by the factfinder, are also unworthy of credence, the majority's analysis disfavors Title VII plaintiffs who do not have direct, tangible evidence of discriminatory intent.[84]

The dissent also pointed out inconsistencies in the Court's holdings.[85] At one point the Court indicated that proof of the falsity of the employer's proffered reasons, without more, will permit the factfinder to infer the ultimate fact of discrimination, while in other parts of the decision, it appeared that the plaintiff must show falsity of the proffered reasons *and* that discrimination was the real reason.[86] The dissent concluded that the majority's approach would favor employers who lie,

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[78] *Id.* at 2760, 62 Fair Empl. Prac. Cas. (BNA) at 109 (citing *Burdine*, 450 U.S. at 256, 25 Fair Empl. Prac. Cas. (BNA) at 116).

[79] *See id.* at 2760–61 & n.7, 62 Fair Empl. Prac. Cas. (BNA) at 109–10 & n.7 (citing *Burdine*, 450 U.S. at 256, 25 Fair Empl. Prac. Cas. (BNA) at 116).

[80] *Id.* at 2752, 62 Fair Empl. Prac. Cas. (BNA) at 102.

[81] *Hicks*, 113 S. Ct. at 2762, 62 Fair Empl. Prac. Cas. (BNA) at 110. The dissent later cites *Aikens*, 460 U.S. at 716, 31 Fair Empl. Prac. Cas. (BNA) at 611, arguing that the analysis under *Aikens* requires the factfinder to choose which party's explanation of the motivation it believes, not one of the vague reasons suggested by the record. *Id.*

[82] *See Hicks*, 113 S. Ct. at 2762, 62 Fair Empl. Prac. Cas. (BNA) at 110.

[83] *See id.* at 2761–62, 62 Fair Empl. Prac. Cas. (BNA) at 110.

[84] *Id.* at 2761, 62 Fair Empl. Prac. Cas. (BNA) at 110.

[85] *Id.* at 2762, 62 Fair Empl. Prac. Cas. (BNA) at 110–11.

[86] *Compare id.* at 2749, 62 Fair Empl. Prac. Cas. (BNA) at 100 (proof of falsity of employer's proffered reasons, without more, will permit trier of fact to infer ultimate fact of discrimination) *with id.* at 2752, 62 Fair Empl. Prac. Cas. (BNA) at 102 (plaintiff must show *both* reason was false *and* discrimination was real reason).

frustrating the purpose of Title VII by discouraging plaintiffs who are afraid of wasting time, effort and money.[87]

The Court's decision in *Hicks* leaves several issues unresolved. For example, it is unclear from a reading of the Court's decision when proof of pretext will be sufficient to permit the trier of fact to find for the plaintiff, and when more evidence will be necessary.[88] Although the Court now requires that a plaintiff prove pretext and prove that the real reason for its action was discriminatory, the question remains whether a plaintiff's evidence of incredibility of the employer's articulated reasons can satisfy both of these at once, without more. In addition, it is unclear what type of additional evidence will be necessary, especially in the absence of tangible evidence, to prove that the employer has actually discriminated.

The apparent effect of the Court's holding is to make it more difficult for plaintiffs to prevail on allegations of disparate treatment, especially where there exists no tangible evidence of discrimination. Some may argue, however, that plaintiffs are helped by this decision since they are not always required to produce more evidence than their prima facie case and proof of pretext of the employer's reasons. The Court's indication that proving pretext is sufficient to permit a finding for the plaintiff, seems to leave much discretion to factfinders.[89] Given identical circumstances, evidence introduced in a showing of a prima facie case for discrimination and a showing of pretext may mean different things to different factfinders. That which one factfinder believes to be sufficient to establish discrimination in light of incredible articulated reasons by an employer, may not prove discrimination in the eyes of a different factfinder.

The Court's decision opens the door for employers who do not have legitimate reasons for their disparate treatment of employees to

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[87] *Id.* at 2763, 62 Fair Empl. Prac. Cas. (BNA) at 112.

[88] *See* Schweigert v. Provident Life Ins. Co., 503 N.W.2d 225, 228, 62 Fair Empl. Prac. Cas. (BNA) 443, 446 (N.D. 1993). In *Schweigert*, the North Dakota Supreme Court declared that:

> The *Hicks* decision does not disturb the reality that success in establishing the incredibility of the employer's asserted reasons will, in most instances, insure success for the plaintiff, because the incredibility of the employer's reasons 'will permit the trier of fact to infer the ultimate fact of intentional discrimination' . . . All *Hicks* does is hold that discrimination is a matter of fact, not law. . . .

Id.

[89] *See* LeBlanc v. Great Am. Ins. Co., No. 93-1050, slip op. at 16 (1st Cir. Sept. 29, 1993) (holding in action brought pursuant to Age Discrimination Employment Act, under *McDonnell Douglas* analysis, plaintiff's showing employer's justification for its actions to be pretextual, together with elements of plaintiff's prima facie case for discrimination, may or may not lead factfinder to infer employer engaged in intentional discrimination).

nonetheless successfully defend themselves. Under *Hicks*, they need only make up some nondiscriminatory reasons for their actions for the case to progress.[90] This is not to say *Hicks* will encourage discrimination by employers, but creative lawyering may allow employers to fabricate enough vague reasons that they cannot all be proven to be pretextual. Even if they are all proven to be pretextual, the plaintiff will still have to prove that discrimination was the real reason.

St. Mary's Honor Center v. Hicks is a narrow decision, with former Justice White in the majority. Almost immediately after the decision, debate began concerning its application.[91] It appears, however, that employers have gained as a result of the decision, and Title VII disparate treatment plaintiffs will have a more difficult time proving their cases. By requiring pretext-plus, the Court assuages fears of condemning employers whose articulated reasons may not be altogether credible. Rather, the plaintiff bringing suit now must convince the judge or jury not merely what the defendant did not do (i.e. give legitimate reasons), but what the defendant did do (i.e. discriminate).[92] Intuitively, it makes sense that the plaintiff should have to prove that the defendant committed the action(s) upon which the complaint is based.[93]

In sum, the United States Supreme Court, in *St. Mary's Honor Center v. Hicks*, held that Title VII plaintiffs must now demonstrate that the evidence they have presented at the third prong of the *McDonnell Douglas* analysis to establish that the employer's articulated legitimate reasons for its actions are actually pretextual (together with the elements of the prima facie case), also consists of evidence that the real reason is intentional discrimination.[94] If the plaintiff cannot demon-

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[90] *See* Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255, 15 Fair Empl. Prac. Cas. (BNA) 746, 748 (5th Cir. 1977) (Fifth Circuit required preponderance of evidence standard for defendant's rebuttal of prima facie case, partly due to fear employer would compose fictitious legitimate reasons for actions).

[91] *See, e.g., Schweigert*, 503 N.W.2d at 228–29, 62 Fair Empl. Prac. Cas. (BNA) at 446. In a case brought under North Dakota labor law, decided six days after *Hicks*, the North Dakota Supreme Court, not being bound by the decision, modified the *McDonnell Douglas* analysis and disregarded *Hicks* by requiring the employer to prove its legitimate reasons for its actions by a preponderance of the evidence. *Id.* If the employer failed to meet this standard, it would lose, regardless of the pretext-plus analysis suggested by *Hicks*. *Id.* at 229, 62 Fair Empl. Prac. Cas. (BNA) at 446.

[92] *See LeBlanc*, No. 93-1050, slip op. at 14–15 (court held in applying *McDonnell Douglas* analysis, plaintiff must show sufficient evidence of pretext *and* evidence that overall reasonably supports finding of discriminatory animus).

[93] *See Hicks*, 113 S. Ct. at 2756, 62 Fair Empl. Prac. Cas. (BNA) at 106 ("That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct").

[94] *See Hicks*, 113 S. Ct. at 2749 n.4, 62 Fair Empl. Prac. Cas. (BNA) at 100 n.4.

strate discrimination on pretext evidence alone, he or she must present additional evidence to prove a discriminatory animus. Though the Court's decision appears to favor employers, the future of the case is unclear, especially given its ambiguities.

II. GENDER DISCRIMINATION

A. **Gender Discrimination in Law Firm Partnership Decisions:* Ezold v. Wolf, Block, Schorr and Solis-Cohen[1]

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of an individual's race, color, religion, sex, or national origin.[2] In passing Title VII, Congress intended to prevent "disparate treatment," which occurs when members of protected groups are treated less favorably than similarly situated members of favored groups.[3] Title VII prohibits employers from refusing to promote an employee solely because of the employee's race, color, religion, sex, or national origin.[4] Plaintiffs may sue under one of two disparate treatment theories: "pretext" or "mixed-motives."[5] In pretext cases, the issue is whether legal or illegal motives—but not both—motivated the employer's actions.[6]

In 1973, in *McDonnell Douglas Corp. v. Green,* the United States Supreme Court set forth the analysis for a Title VII pretext case.[7] In

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[1] Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 60 Fair Empl. Prac. Cas. (BNA) 849 (3d Cir. 1992), *cert. denied,* 114 S. Ct. 88, 62 Fair Empl. Prac. Cas. (BNA) 1520 (1993).

[2] 42 U.S.C. § 2000e-2 (1988). Section 2000e-2 of Title VII states in pertinent part:

> (a) Employer practices:
>
> It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Id.

[3] BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 2, 1286 (2d ed. 1983). Also prohibited under Title VII are policies and practices which: 1) perpetuate in the present the effects of past discrimination; 2) have an adverse impact not justified by business necessity; and 3) fail to accommodate religious observances and practices. *Id.* at 2.

[4] *See id.* at 1286.

[5] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 246–47, 49 Fair Empl. Prac. Cas. (BNA) 954, 961 (1989) (plurality opinion).

[6] *See Ezold,* 983 F.2d at 522, 60 Fair Empl. Prac. Cas. (BNA) at 861. In mixed-motives cases, the issue is whether an illegal motive was the "motivating" or "substantial" factor in an employer's action, or whether the decision would have been made regardless of the illegal motive. *Id.* at 522, 60 Fair Empl. Prac. Cas. (BNA) at 860–61.

[7] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800–05, 5 Fair Empl. Prac. Cas. (BNA) 965, 968–70 (1973).

McDonnell Douglas, the plaintiff, a black male, was laid off due to general reductions in the employer's work force.[8] The following year, the employer publicly advertised openings for the job the plaintiff had held.[9] The plaintiff re-applied for his old job, and was rejected.[10] He then sued McDonnell Douglas for racial discrimination.[11]

The *McDonnell Douglas* Court established the order and allocation of proof in a Title VII pretext claim.[12] First, the plaintiff must establish a prima facie case of discrimination.[13] The *McDonnell Douglas* Court recognized that the elements of a prima facie case may be changed to fit differing factual situations.[14] The second burden, according to *McDonnell Douglas*, is the defendant's burden to rebut the prima facie case with a "legitimate, nondiscriminatory reason" for its actions.[15] Finally, the burden shifts back to the plaintiff to demonstrate that the defendant's presumptively valid reason for its decision was in fact a pretext, intended to coverup a discriminatory decision.[16]

In 1981, in *Texas Department of Community Affairs v. Burdine*, the Supreme Court further explained the Title VII analysis in disparate treatment cases.[17] The plaintiff in *Burdine* was a woman employed by

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[8] *Id.* at 794, 5 Fair Empl. Prac. Cas. (BNA) at 966.

[9] *Id.* at 796, 5 Fair Empl. Prac. Cas. (BNA) at 966.

[10] *Id.* McDonnell Douglas claimed that the plaintiff was turned down because of his participation in illegal actions against the company. *Id.* The plaintiff was a "long-time activist in the civil rights movement" who had participated in "stall-ins" and "lock-ins" against the company to protest what he alleged were racially motivated employment decisions. *Id.* at 794, 5 Fair Empl. Prac. Cas. (BNA) at 966.

[11] *Id.* at 797, 5 Fair Empl. Prac. Cas. (BNA) at 967. The plaintiff first brought a complaint with the Equal Employment Opportunity Commission. *Id.* at 796, 5 FEP at 966–67. After the Commission failed to conciliate the dispute, the plaintiff brought his civil action. *Id.* at 797, 5 Fair Empl. Prac. Cas. (BNA) at 967.

[12] *McDonnell Douglas*, 411 U.S. at 800–05, 5 Fair Empl. Prac. Cas. (BNA) at 968–70.

[13] *Id.* at 802, 5 Fair Empl. Prac. Cas. (BNA) at 969. The elements of a prima facie case, as established in *McDonnell Douglas*, are the following: 1) the plaintiff is a member of a protected class; 2) the plaintiff applied and was qualified for a position in which the employer was seeking applicants; 3) the employer rejected the application, in spite of the plaintiff's qualifications; and 4) the position remained open and the employer continued to seek applications. *Id.*

The Court established, in a later case, that the plaintiff's burden was to prove a prima facie case by a preponderance of the evidence. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252–53, 25 Fair Empl. Prac. Cas. (BNA) 113, 115 (1981).

[14] *Burdine*, 450 U.S. at 253 n.6, 25 Fair Empl. Prac. Cas. (BNA) at 115 n.6; *McDonnell Douglas*, 411 U.S. at 802 n.13, 5 Fair Empl. Prac. Cas. (BNA) at 969 n.13.

[15] *McDonnell Douglas*, 411 U.S. at 802, 5 Fair Empl. Prac. Cas. (BNA) at 969; *see also Burdine*, 450 U.S. at 254, 25 Fair Empl. Prac. Cas. (BNA) at 116.

[16] *McDonnell Douglas*, 411 U.S. at 805, 5 Fair Empl. Prac. Cas. (BNA) at 970.

[17] 450 U.S. at 249–50, 25 Fair Empl. Prac. Cas. (BNA) at 114–17. In 1993, in *St. Mary's Honor Center v. Hicks* (subsequent to the Third Circuit's decision in *Ezold*), the United States Supreme Court further explained the *McDonnell Douglas/Burdine* burden shifting for Title VII litigation. 113 S. Ct. 2742 (1993). How significantly *St. Mary's* changes the law is still unclear. *See St. Mary's*, 113 S. Ct. at 2756 (Souter, J., dissenting).

the Texas Department of Community Affairs who applied for the position of Project Director.[18] The position remained unfilled for many months, when a man from another division in the department was given the job.[19]

The *Burdine* Court explained that the burden on the plaintiff to establish a prima facie case is not an onerous one.[20] The Court further explained that the prima facie case created an inference of discrimination.[21] The *Burdine* Court clarified the second burden, explaining that the defendant must introduce evidence of a reason for its actions which would be legally sufficient to support a judgment in the defendant's favor.[22] If the defendant successfully produces such evidence, the inference of discrimination is rebutted, and the "factual inquiry proceeds to a new level of specificity."[23] The *Burdine* Court also explained the dual purpose of this burden: 1) the defendant meets the plaintiff's prima facie charge, while, 2) simultaneously framing the factual issue so that the plaintiff will have a full and fair opportunity to demonstrate pretext.[24]

The *Burdine* Court went on to explain the plaintiff's final burden of demonstrating pretext.[25] This final burden merges with the plaintiff's ultimate burden of proving that she has been a victim of intentional discrimination.[26] "Explicit evidence of discrimination—*i.e.*, the 'smoking gun'—is not required."[27] Rather, the *Burdine* Court allowed the plaintiff two ways of establishing pretext.[28] The plaintiff may directly persuade the court that a discriminatory reason was more likely to have motivated the defendant than the proffered reason, or the plaintiff may indirectly show that the defendant's proffered reason is unworthy of credence.[29]

During the *Survey* year, in *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, the United States Court of Appeals for the Third Circuit held that, when comparing similarly situated people in a Title VII pretext case,

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[18] *Id.* at 250, 25 Fair Empl. Prac. Cas. (BNA) at 114.

[19] *Id.* at 250–51, 25 Fair Empl. Prac. Cas. (BNA) at 114.

[20] *Id.* at 253, 25 Fair Empl. Prac. Cas. (BNA) at 115.

[21] *Id.* at 254, 25 Fair Empl. Prac. Cas. (BNA) at 116.

[22] *Burdine*, 450 U.S. at 255, 25 Fair Empl. Prac. Cas. (BNA) at 116.

[23] *Id.*

[24] *Id.* at 255–56, 25 Fair Empl. Prac. Cas. (BNA) at 116.

[25] *Id.* at 256, 25 Fair Empl. Prac. Cas. (BNA) at 116.

[26] *Id.*

[27] Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 523, 60 Fair Empl. Prac. Cas. (BNA) 849, 862 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 88, 62 Fair Empl. Prac. Cas. (BNA) 1520 (1993).

[28] *Burdine*, 450 U.S. at 256, 25 Fair Empl. Prac. Cas. (BNA) at 116.

[29] *Id.*

the trial court may not substitute its own subjective standard for that of a law firm in making partnership decisions.[30] In *Wolf*, a law firm had denied partnership to a female associate.[31] The Third Circuit reasoned that the United States District Court for the Eastern District of Pennsylvania had failed to see that the evidence could not support a finding of sex discrimination because its own judgment of what the firm's standard should have been had unduly influenced the court.[32] Because Title VII does not entitle courts to create their own personnel standards for private employers, the Third Circuit reversed the district court and ruled that the law firm had not violated the law.[33]

In 1983, the law firm of Wolf, Block, Schorr and Solis-Cohen ("Wolf") hired Nancy Ezold ("Ezold") as an associate on a partnership track.[34] Ezold graduated from Villanova Law School in the top third of her class and, prior to joining Wolf, worked for two small firms in Philadelphia.[35] Ezold was a member of Wolf's litigation department for her entire tenure with the firm.[36]

Throughout her tenure, Ezold was reviewed under Wolf's standard evaluation process.[37] The partnership decision, in 1988, required review by a ten-person Associates Committee.[38] The Associates Committee then made recommendations to a five-person Executive Committee, which in turn made a recommendation to the full voting partnership.[39]

Wolf partners evaluate associates on a semi-annual or annual basis, depending upon the associate's seniority.[40] The evaluations ask the partner's degree of contact with each associate, and then list ten criteria of legal performance and ten criteria of personal characteristics.[41] Although the format changed throughout Ezold's tenure, the evaluations always listed legal analysis as the first criterion.[42] For each

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[30] 983 F.2d at 512–13, 60 Fair Empl. Prac. Cas. (BNA) at 853.

[31] *Id.* at 513, 60 Fair Empl. Prac. Cas. (BNA) at 853.

[32] *Id.* at 512–13, 60 Fair Empl. Prac. Cas. (BNA) at 853.

[33] *See id.*

[34] *Id.* at 514, 60 Fair Empl. Prac. Cas. (BNA) at 854.

[35] *Ezold*, 983 F.2d at 514, 60 Fair Empl. Prac. Cas. (BNA) at 854.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Ezold*, 983 F.2d at 514, 60 Fair Empl. Prac. Cas. (BNA) at 854.

[41] *Id.* at 515, 60 Fair Empl. Prac. Cas. (BNA) at 854–55. The ten criteria of legal performance are: legal analysis; legal writing and drafting; research skills; formal speech; informal speech; judgment; creativity; negotiating and advocacy; promptness; and efficiency. *Id.* The ten personal characteristics are: reliability; taking and managing responsibility; flexibility; growth potential; attitude; client relationship; client servicing and development; ability under pressure; ability to work independently; and dedication. *Id.*

[42] *Id.* at 515, 60 Fair Empl. Prac. Cas. (BNA) at 855.

of the criteria, associates received grades on a Distinguished, Good, Acceptable, Marginal or Unacceptable scale.[43]

The evaluations also asked partners to describe each candidate's strengths and weaknesses and to recommend that an associate be made partner with "enthusiasm," "favor," "mixed emotions" or "negative feelings."[44] One partner then compiled all of the evaluations into a book and reduced them to a "bottom line" summary memo which served as a starting point for the Associates Committee's discussion of each candidate.[45]

Ezold's evaluations included a wide range of grades and comments.[46] Throughout her tenure with Wolf, however, a significant number of partners consistently questioned her legal analytic ability.[47] In 1988, thirty-two partners made recommendations for Ezold's admission to partnership.[48] Seven recommended her "with enthusiasm," fourteen "with favor," six "with mixed emotions," four with "negative feelings," and one with "mixed emotions/negative feelings."[49] Of the four "negative feelings," three were partners in Ezold's own department.[50]

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[43] *Id.*

[44] *Id.*

[45] *Ezold*, 983 F.2d at 515–16, 60 Fair Empl. Prac. Cas. (BNA) at 855. Each member of the Associates Committee is responsible for an initial assessment of one of the candidates for partner. *Id.* at 516, 60 Fair Empl. Prac. Cas. (BNA) at 856. This assessment, which is the Committee member's summarization of his or her own personal view of the candidate's evaluations, is known as the "bottom line" memo. *Id.* In 1988, Ezold's overall score in legal skills on the bottom line memo was a "G" for good. *Id.*

[46] *Id.* at 516–20, 60 Fair Empl. Prac. Cas. (BNA) at 856–59. As the court noted, "given the number of reviewing partners, the evaluations often contain a wide range of divergent views." *Id.* at 515, 60 Fair Empl. Prac. Cas. (BNA) at 855.

[47] *See id.* at 516–20, 60 Fair Empl. Prac. Cas. (BNA) at 856–59. The court quotes poor reviews of Ezold's legal skills made by four different partners from 1985 and 1986. *Id.* at 516–17, 60 Fair Empl. Prac. Cas. (BNA) at 856–57. The court then produced summary charts for the years 1987 and 1988. *Id.* at 518–20, 60 Fair Empl. Prac. Cas. (BNA) at 557–59. In 1987, Ezold received one "Marginal," four "Acceptables," and three "Goods." *Id.* at 518, 60 Fair Empl. Prac. Cas. (BNA) at 557–58. Two of the "Goods" were from partners who had little contact with her. *Id.* The other "Good" included the following comment: "She remains a little weak in her initial analysis of complex legal issues." *Id.* Two others had no grade, but commented, "I have been singularly unimpressed with the level of her ability," and "there seems to be serious question as to whether she has the legal ability to take on large matters and handle them on her own." *Id.*

The 1988 results were similar: one "Marginal," five "Acceptables," and five "Goods," with four of the five "Goods" coming from partners with slight contact. *Id.* at 519–20, 60 Fair Empl. Prac. Cas. (BNA) at 558–59. Again, ungraded comments made statements such as, "would feel comfortable turning over a significant matter for one of his clients 'if not too complex.'" *Id.* at 519, 60 Fair Empl. Prac. Cas. (BNA) at 858.

[48] *Ezold*, 983 F.2d at 520, 60 Fair Empl. Prac. Cas. (BNA) at 859.

[49] *Id.*

[50] *Id.*

A recurring theme in Ezold's negative evaluations was a lack of confidence in her ability to handle complex litigation.[51] The ability to be the lead partner on a complex case has traditionally been the mark of a Wolf partner.[52] Based on these evaluations, the Associates Committee voted 9–1 not to recommend Ezold for partnership.[53] The Associates Committee, at the initiation of an Ezold supporter, discussed modifying the partnership standard because Ezold had other valuable skills.[54] The committee ultimately rejected this suggestion.[55] Out of Ezold's class of eight candidates, the Associates Committee recommended five male associates and one female associate for partnership.[56] One male associate, Associate X, was not recommended for partnership.[57]

Upon receiving the negative recommendations, the Executive Committee conducted its own review of both Ezold and Associate X.[58] The Executive Committee review concluded that Ezold should not be recommended for partnership unless the firm was prepared to lower the firm's partnership standards.[59] All five members of the Executive Committee voted not to recommend Ezold's admission to the partnership.[60]

Ezold brought suit in the United States District Court for the Eastern District of Pennsylvania, alleging that Wolf intentionally discriminated against her on the basis of her sex.[61] The district court compared Ezold to Associates A-H—eight successful male candidates—and concluded that the test applied to Ezold was different from the

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[51] *See id.* at 516–20, 60 Fair Empl. Prac. Cas. (BNA) at 856–59.

[52] *See id.* at 517, 532, 60 Fair Empl. Prac. Cas. (BNA) at 857, 869.

[53] *Ezold*, 983 F.2d at 520, 60 Fair Empl. Prac. Cas. (BNA) at 859.

[54] *Id.* The Committee did feel that Ezold had other positive attributes. *Id.* As one partner believed: "[A]lthough [Ezold] was not up to par on her legal analytic ability, . . . deficiency in a particular area, even though it was a traditional area where we required a certain superior level, could be overlooked or relaxed where there were sufficiently compensating skills in other areas." *Id.*

[55] *Id.*

[56] *Id.* at 520, 60 Fair Empl. Prac. Cas. (BNA) at 860.

[57] *Id.*

[58] *Ezold*, 983 F.2d at 520–21, 60 Fair Empl. Prac. Cas. (BNA) at 860.

[59] *Id.* at 521, 60 Fair Empl. Prac. Cas. (BNA) at 860.

[60] *Id.* Charles Kopp, the Chairman of the Executive Committee, told Ezold that two domestic relations partners were leaving the firm, and that if she agreed to work in this department, she would be made a partner in one year. *Id.* Kopp believed that Ezold could handle domestic relations because she was effective with clients, and because domestic relations work did not require the same level of complex analysis as commercial litigation. *Id.* Ezold declined this offer, as well as an offer to remain with the firm as a litigation associate. *See id.*

[61] Ezold v. Wolf, Block, Schorr & Solis-Cohen, 751 F. Supp. 1175, 1176, 54 Fair Empl. Prac. Cas. (BNA) 808, 808 (E.D. Pa. 1990).

test applied to male associates.[62] The district court found Wolf's purported reasons for its decisions to be pretextual because, in the court's analysis, Wolf promoted male associates who had the same level of criticism as Ezold had.[63] Thus, the district court concluded that Ezold had "established that the defendant's purported reasons for its conduct [were] pretextual."[64]

Wolf appealed to the United States Court of Appeals for the Third Circuit.[65] The firm contended that the district court had "improperly substituted its own subjective judgment" concerning both the firm's partnership standard, as well as whether or not Ezold met the standard.[66] In its analysis, the Third Circuit considered only the sufficiency of the evidence for the district court's findings, using a "clearly erroneous" standard.[67] Following the *McDonnell Douglas* procedure, the Third Circuit found that Ezold had easily established a prima facie case.[68] The court also found that Wolf had given an explanation sufficient to rebut the inference of discrimination.[69] The Third Circuit then addressed the district court's finding that Wolf's proffered explanation was a pretext and concluded that the district court's analysis had been clearly erroneous.[70]

The Third Circuit first examined Wolf's proffered reason for its decision: Ezold's lack of legal analytic ability.[71] The evidence, according to the *Wolf* court, could not demonstrate that legal analytic ability was not a necessary precondition for partnership at Wolf.[72] The *Wolf* court

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[62] *Ezold*, 983 F.2d at 524, 60 Fair Empl. Prac. Cas. (BNA) at 862–63.

[63] *Id.*

[64] *Id.* at 524, 60 Fair Empl. Prac. Cas. (BNA) at 862.

[65] *Id.* at 512, 60 Fair Empl. Prac. Cas. (BNA) at 852.

[66] *Id.* at 525, 60 Fair Empl. Prac. Cas. (BNA) at 863.

[67] *Ezold*, 983 F.2d at 525–26, 60 Fair Empl. Prac. Cas. (BNA) at 863–64. Wolf, relying on Logue v. International Rehabilitation Assoc., Inc., 837 F.2d 150, 45 Fair Empl. Prac. Cas. (BNA) 1382 (3d Cir. 1988), argued that the appellate court should have plenary review of the issues. *Ezold*, 983 F.2d at 525, 60 Fair Empl. Prac. Cas. (BNA) at 863. The appellate court ruled that "[t]he district court's refusal to credit or make findings concerning all of Wolf's proffered evidence" did not subject its findings to plenary review. *Id.* Thus, the appellate court followed the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a) in evaluating the district court's resolution of the ultimate issue. *Id.* at 525–26, 60 Fair Empl. Prac. Cas. (BNA) at 864–65.

[68] *Id.* at 523, 60 Fair Empl. Prac. Cas. (BNA) at 861–62. The appellate court agreed with the district court, which had found that "favorable evaluations" and "a score of 'G' on her 1988 bottom line memo" satisfied the prima facie requirement that Ezold be "qualified." *Id.*

[69] *Id.* at 524, 60 Fair Empl. Prac. Cas. (BNA) at 862.

[70] *Id.* at 524, 526–29, 60 Fair Empl. Prac. Cas. (BNA) at 863–66.

[71] *Id.* at 526–27, 60 Fair Empl. Prac. Cas. (BNA) at 864–65. Legal analysis was defined on the 1987 and 1988 evaluation forms as the "ability to analyze legal issues; grasp problems; collect, organize and understand complex factual issues." *Id.* at 515, 60 Fair Empl. Prac. Cas. (BNA) at 855.

[72] *See Ezold*, 983 F.2d at 527, 60 Fair Empl. Prac. Cas. (BNA) at 864–65. The court stated that

noted that no one was taken into the partnership without "serious consideration of [her] strength in the category of legal analytic ability."[73] The firm's refusal to relax its standards was not evidence of illegal discrimination.[74] The court found that the evidence could not cast doubt on Wolf's proffered reason for its decision.[75]

Because Ezold had cast no doubt on Wolf's proffered reason, the district court had erred by using anything other than that reason in its analysis.[76] The Third Circuit explained that the district court had employed a "pick and choose" method of selection and had compared the "personalities, work habits, and other criteria besides legal analysis" of Ezold and male Associates A-H.[77] The district court's comparison had been based on its own judgment of what Wolf's subjective standard should have been.[78] The Third Circuit further noted the right of private employers to make subjective decisions, and the necessity for courts to respect those subjective decisions.[79]

Having established that the district court's analysis was clearly erroneous because it had used the wrong standard for comparison, the Third Circuit proceeded to examine the evidence using the standard Wolf had articulated.[80] The *Wolf* court compared the evaluations of Ezold's legal analytic ability to the same evaluations of male Associates A-H, the allegedly favored group.[81] For Ezold to prevail, the evidence

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"[a]bsent evidence to show that legal analytic ability was not a necessary precondition for partnership at Wolf, the district court's opinion about Ezold's comparative strengths in the other categories on the evaluation form is immaterial." *Id.* at 526, 60 Fair Empl. Prac. Cas. (BNA) at 864.

[73] *Id.*

[74] *Id.* at 526–27, 60 Fair Empl. Prac. Cas. (BNA) at 864.

[75] *See id.* at 527, 60 Fair Empl. Prac. Cas. (BNA) at 864–65.

[76] *Id.* at 527–28, 60 Fair Empl. Prac. Cas. (BNA) at 865.

[77] *Ezold*, 983 F.2d at 528, 60 Fair Empl. Prac. Cas. (BNA) at 866.

[78] *See id.* at 528, 60 Fair Empl. Prac. Cas. (BNA) at 865.

[79] *Id.* at 527, 60 Fair Empl. Prac. Cas. (BNA) at 865. The court analogized to academic tenure decisions, stating that courts must be vigilant not to substitute their own judgment for the judgment of colleges with respect to the qualifications of their faculties. *Id.* The court went on to say that: "These cautions against 'unwarranted invasion or intrusion' into matters involving professional judgments about an employee's qualifications for promotion within a profession inform the remainder of our analysis." *Id.*

For an analysis of the failings of the courts when applying Title VII to academic institutions and other professional or white collar jobs, see Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982). Bartholet argues that the courts' leniency toward subjective standards in white collar situations is in striking contrast to the courts' strict scrutiny of subjective standards in blue collar situations. *See id.* at 975–77.

[80] *See Ezold*, 983 F.2d at 532–39, 60 Fair Empl. Prac. Cas. (BNA) at 869–75.

[81] *Id.* at 533–38, 60 Fair Empl. Prac. Cas. (BNA) at 870–74. The court emphasized that it was comparing *only* the evaluations of legal analysis. *See id.* at 518 n.7, 60 Fair Empl. Prac. Cas. (BNA) at 857 n.7.

had to support the conclusion that her legal analytic ability was equal to that of at least one male who was made a partner.[82]

Re-examining the record, the Third Circuit found no evidence that Ezold had been treated differently from male associates.[83] First, the court did not believe that Ezold had placed any doubt on the substantial number of negative evaluations of her legal analytic ability.[84] In the *Wolf* court's view, even Ezold's supporters supported Ezold for reasons other than legal analytic ability.[85] In fact, the court reasoned, many of her supporters questioned her legal analytic ability.[86]

In addition, the evaluations of Ezold's legal analytic ability did not compare favorably to the evaluations of successful male candidates.[87] Male candidates A-H, according to the Third Circuit, faced "no comparable degree of criticism about their legal analytical skills."[88] The Third Circuit also compared Ezold to men who were passed over for partnership, which the district court had failed to do, and again found no evidence to show that men and women had been treated differently.[89] The Third Circuit concluded that the evidence was insufficient

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[82] *Id.* at 530, 60 Fair Empl. Prac. Cas. (BNA) at 867–68. The required comparisons are significantly harder to make in cases "involving promotions that are dependent on an employer's balanced evaluation of various subjective criteria." *Id.* at 529, 60 Fair Empl. Prac. Cas. (BNA) at 867.

Andrea Waintroob, in her study of Title VII in white collar and professional jobs, concluded that "as the employment level rises, judicial tolerance of subjectivity increases." Andrea R. Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 WM. & MARY L. REV. 45, 50 (1979). Waintroob argues that in higher level jobs courts are willing to judge only that the employer's criterion are applied fairly, not that the criterion are fair. *See id.* at 52–54.

[83] *Ezold*, 983 F.2d at 547, 60 Fair Empl. Prac. Cas. (BNA) at 881.

[84] *Id.* at 532, 60 Fair Empl. Prac. Cas. (BNA) at 869.

[85] *Id.* at 532–33, 60 Fair Empl. Prac. Cas. (BNA) at 869.

[86] *Id.*

[87] *Id.* at 533–38, 60 Fair Empl. Prac. Cas. (BNA) at 870–74.

[88] *Ezold*, 983 F.2d at 538, 60 Fair Empl. Prac. Cas. (BNA) at 874. The court undertook extensive analysis of the comments and grades of these other associates, comparing each to Ezold. *Id.* at 533–38, 60 Fair Empl. Prac. Cas. (BNA) at 870–74. The court found that associates A-H each got better legal analysis grades, both on the whole and from individual partners. *See id.* For instance:

> [T]he district court failed to point out that no partner actually rated A lower than Ezold in the criterion of legal analysis . . . .
>
> Gregory Magarity, Ezold's most ardent advocate, rated A as "distinguished" in legal analysis in 1987 and 1988, higher than the grade of "good" he gave Ezold in those years . . . . Boote, a supporter of Ezold, also rated A higher than Ezold in this category.

Id. at 533–34, 60 Fair Empl. Prac. Cas. (BNA) at 870.

[89] *Id.* at 538–39, 60 Fair Empl. Prac. Cas. (BNA) at 874–75. The court offered a long paragraph of quotes about male associates who were not promoted to partner, such as, "[he] has good talents although he is not as capable in legal analysis as others," and "[his] best skills are

to show that Wolf's proffered standard for its decision was unworthy of credence, or that Wolf, under that standard, had treated Ezold differently from similarly-situated men.[90]

Finally, the Third Circuit Court of Appeals examined Wolf's past treatment of the plaintiff, its general policy and any specific instances of past behavior which might indicate that gender was "more likely" to have been the cause of dismissal than Wolf's proffered reason.[91] Again, the court found no evidence of disparate treatment based on gender.[92] With no evidence to show disparate treatment, the Third Circuit reversed and remanded for entry of judgment in favor of Wolf.[93]

Ezold v. Wolf, Block, Schorr & Solis-Cohen received national attention, because it is believed to be the first sex-discrimination case against a law firm to reach the trial stage.[94] Thus, for many women, the case was a symbolic one.[95] In fact, the Women's Law Project submitted an amicus curiae brief for twenty-five groups.[96] Although the appellate court ruled in Wolf's favor, the case is still expected to have an impact on law firms' partnership decisions.[97] Many firms recognized that it

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in client relations and desire to please, rather than legal analysis or intellectual genius." *Id.* at 538, 60 Fair Empl. Prac. Cas. (BNA) at 874.

[90] *Id.* at 539, 60 Fair Empl. Prac. Cas. (BNA) at 874–75.

[91] *See id.* at 539–47, 60 Fair Empl. Prac. Cas. (BNA) at 875–81. The district court had found three other pieces of evidence which it believed supported Ezold's claim of pretext. *Id.* at 539–40, 60 Fair Empl. Prac. Cas. (BNA) at 875. First, there were four instances of conduct which evidenced discriminatory animus. *Id.* Second, Wolf's assignment process kept Ezold away from the difficult cases, so that she was unable to prove her legal ability. *Id.* at 540, 60 Fair Empl. Prac. Cas. (BNA) at 871. Third, the lack of female partners at Wolf showed a pattern of discrimination. *Id.*

[92] *Ezold*, 983 F.2d at 540–47, 60 Fair Empl. Prac. Cas. (BNA) at 875–81. As to her poor assignments, the court found that Ezold's early assignments were not relevant in evaluating the partnership decision. *Id.* at 540–41, 60 Fair Empl. Prac. Cas. (BNA) at 875–76. In addition, her assignments were due to her credentials and evaluations, not to her gender. *See id.* at 541, 60 Fair Empl. Prac. Cas. (BNA) at 876. Finally, assignment issues came up with male associates, showing that the issue was one of treating all employees fairly, which the law does not mandate, rather than an issue of invidious discrimination. *Id.* at 542, 60 Fair Empl. Prac. Cas. (BNA) at 876–77.

As to the number of female partners, the court concluded that raw numbers, absent any analysis of the qualified applicant pool or the flow of qualified applicants, were not probative of Wolf's alleged discriminatory intent. *Id.* at 542–43, 60 Fair Empl. Prac. Cas. (BNA) at 877–78.

Finally, the court found that the specific instances of conduct involved partners no longer with the firm, legitimate complaints about Ezold's behavior with the support staff, and incorrectly drawn factual conclusions. *See id.* at 543–45, 60 Fair Empl. Prac. Cas. (BNA) at 878–80.

[93] *Id.* at 547–48, 60 Fair Empl. Prac. Cas. (BNA) at 881.

[94] Richard Burke, *Wolf, Block is the Loser in Sex-Bias Case*, PHILA. INQ., Nov. 28, 1990, at A1; Marian Uhlman, *High Court Refuses to Hear Lawyer's Sex-Bias Case*, PHILA. INQ., Oct. 5, 1993, at B1; Susan Warner, *Court Backs Wolf, Block in Sex-Bias Case*, PHILA. INQ., Dec. 31, 1992, at A1.

[95] Melissa Dribben, *Nancy Ezold, Torchbearer*, PHILA. INQ., Jan. 7, 1993, at B1.

[96] *Ezold*, 983 F.2d at 512, 60 Fair Empl. Prac. Cas. (BNA) at 852. Fifty-five organizations joined the brief which was submitted to the Supreme Court of the United States. Uhlman, *supra* note 94, at B5.

[97] Janet L. Fix, *A Woman's Case, A Nation's Issue*, PHILA. INQ., Dec. 3, 1990, at C1. The then

might very easily have been them, instead of Wolf, defending their own hiring practices in a gender-discrimination suit.[98]

In ruling for Wolf, the Third Circuit has extended to law firms the deference typically shown in Title VII litigation to professional organizations which have made "subjective" decisions.[99] The court did not subject Wolf's stated reason for its actions to a significant amount of scrutiny.[100] Thus, as long as an employer can articulate a legitimate subjective reason for its actions and provide a reasonable amount of documentation, the employer appears to be insulated from serious judicial review.[101] The plaintiff will bear a stiff burden in showing either the employer's stated reason or the subjective judgments unworthy of credence.

Critics argue that by removing subjective decision-making from judicial review, courts are enforcing the "glass-ceiling" which prevents minorities from reaching the top of professional organizations.[102] The courts' respect for professional organizations' subjective standards, according to the critics, allows the perpetuation of inequality in the guise of neutral decision-making.[103] These "standards" will allow the favored groups who are already atop the professional hierarchies to ensure that those who have been historically discriminated against will continue to be excluded.[104] Thus, the critics fear that the "hands-off" policy which the Third Circuit announced will allow discriminatory

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chancellor of the Philadelphia Bar Association said "the judge's opinion will be felt in every law firm in the country." *Id.* at C1.

Similarly, Ezold's lawyer, Judith P. Vladeck believed the original decision would "[send] a message to a male-dominated profession." Burke, *supra* note 94, at A1. Mark Dichter, Wolf's lawyer, claimed that "[i]f left standing, (the ruling) can have broad implications" for the legal profession. *Id.* at A12. According to Burke's article, Dichter claimed the ruling would have allowed "everybody who is unhappy" to file a lawsuit. *Id.*

[98] *See* Mary Walton, *Fighting the Firm*, PHILA. INQ. FEATURES MAG., July 28, 1991, at 11.

[99] *See* Bartholet, *supra* note 79, at 975–76 (courts apply far more lenient standards to white collar employers).

[100] Linda Wharton et al., *Ezold Case is a Fight for Women*, PHILA. INQ., Feb. 15, 1993, at A13.

[101] *See id.* at A13; Uhlman, *supra* note 94, at B5 (the Third Circuit's ruling "makes it almost impossible to envision a discrimination case in which a plaintiff employed in an upper-level job could win without 'smoking gun' proof").

It is unclear which subjective reasons will be accepted as legitimate by the Third Circuit. *See Ezold*, 983 F.2d at 526–27, 60 Fair Empl. Prac. Cas. (BNA) at 864–65. It is clear that the burden is on the plaintiff to "[cast] doubt on an employer's articulated reasons for an employment decision." *Id.* at 527, 60 Fair Empl. Prac. Cas. (BNA) at 865.

[102] Uhlman, *supra* note 94, at B1; Warner, *supra* note 94, at A1; Wharton et al., *supra* note 100, at A3.

[103] *See* Dottie Enrico, *Top Court Thickens 'Glass Ceiling'*, NEWSDAY, Oct. 5, 1993, at 33.

[104] *See* Clare Dalton, *Discrimination at its Most Dangerous*, BOST. GLOBE, Oct. 3, 1993, at A1, A4. Dalton argues that whether this discrimination is deliberate or not, whether it is conscious or not, it is what happens. *Id.*

practices to continue, as long as they are hidden behind the cloak of a "subjective" standard.[105] Institutional inequality and discrimination will be allowed to continue so long as the subjective criteria are applied in a "fair" procedure.[106]

In sum, the United States Court of Appeals for the Third Circuit, in *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, ensured that judges in Title VII suits will defer to subjective standards offered by professional defendants as the legitimate reason for their actions.[107] The Third Circuit was willing to review the entire record in order to find that the evidence could not support the district court's verdict. In the future, the difficulty which professional Title VII plaintiffs have in pretext discrimination suits will continue.

III. RACIAL DISCRIMINATION

A. **Reductions-in-Force Do Not Absolve Employers From Title VII Liability:* Josey v. John R. Hollingsworth Corporation[1]

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employers from making employment decisions on the basis of race, color, religion, sex or national origin.[2] Congress enacted Title VII to assure the equality of employment opportunities by eliminating arbitrary preferences for any group, minority or majority.[3] Accordingly, an employer may avoid liability by articulating a legitimate, nondiscriminatory reason for its employment decision.[4] For example, an employer

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[105] *See* Wharton et al., *supra* note 100, at A13 (courts, for unexplained reasons, will treat law firms with kid gloves).

Elizabeth Bartholet argues that the courts' unwillingness to intrude on white collar decisions, compared to their willingness to intrude on blue collar decisions, is ironic. Bartholet, *supra* note 79, at 979–80. The courts argue that they are not qualified to make tenure or partnership decisions. *Id.* at 979. However, Bartholet points out, judges certainly know more about working in academia or in a law firm than they do about working in a factory. *Id.* at 979.

[106] *See generally* Waintroob, *supra* note 82, at 45–119.

[107] *See Ezold*, 983 F.2d at 527, 60 Fair Empl. Prac. Cas. (BNA) at 864–65.

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[1] 996 F.2d 632, 62 Fair Empl. Prac. Cas. (BNA) 221 (3d Cir. 1993).

[2] 42 U.S.C. § 2000e-2 (1988). The relevant section of Title VII states: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.*

[3] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800–01, 5 Fair Empl. Prac. Cas. (BNA) 965, 968, *motion of respondent to retax costs denied*, 414 U.S. 811, 811 (1973).

[4] *See id.* at 802, 5 Fair Empl. Prac. Cas. (BNA) at 969.

may proffer that its decision to discharge an employee was part of a general reduction-in-workforce precipitated by economic concerns.[5]

In 1973, in *McDonnell Douglas Corp. v. Green*, the United States Supreme Court developed a three-prong allocation of proof for employment discrimination cases brought under Title VII.[6] The plaintiff in *McDonnell Douglas*, a qualified African-American mechanic, was laid off by McDonnell Douglas during a general workforce reduction.[7] Soon afterward, McDonnell Douglas publicly advertised for qualified mechanics and the plaintiff was rejected for re-employment.[8] The plaintiff alleged that he was rejected on account of his race.[9] The *McDonnell Douglas* Court found that the first prong of the Title VII proof allocation, which places the initial burden of establishing a prima facie case for Title VII discrimination on the complainant, had been satisfied by the plaintiff.[10] Likewise, the Court found that the second prong, which shifts the burden to the employer to articulate a legitimate, nondiscriminatory reason for its allegedly discriminatory action, had been successfully met by McDonnell Douglas.[11] The Court reasoned, however, that while an employer may justifiably refuse to rehire an employee who has engaged in unlawful acts against it, under the third prong of the burden allocation, the plaintiff must be given a "full and fair opportunity" to demonstrate that the employer's proffered reason for discharging him was pretextual.[12] Thus, the Court

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[5] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 251, 254–56, 25 Fair Empl. Prac. Cas. (BNA) 113, 114, 116 (1981).

[6] *McDonnell Douglas*, 411 U.S. at 802–05, 5 Fair Empl. Prac. Cas. (BNA) at 969–70.

[7] *Id.* at 794, 5 Fair Empl. Prac. Cas. (BNA) at 966.

[8] *Id.* at 796, 5 Fair Empl. Prac. Cas. (BNA) at 966.

[9] *Id.* Respondent also alleged that McDonnell Douglas had refused to rehire him because of his involvement with civil rights activities. *Id.* at 796, 5 Fair Empl. Prac. Cas. (BNA) at 966–67.

[10] *Id.* at 802, 5 Fair Empl. Prac. Cas. (BNA) at 969. A complainant successfully establishes a prima facie case by showing (1) that complainant belongs to a racial minority; (2) that complainant applied and was qualified for a job for which the employer was seeking applicants; (3) that complainant was nevertheless rejected; and (4) that after that rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *Id.* The *McDonnell Douglas* Court noted, however, that these requirements will vary with the particular facts of the case at hand, and agreed with the Court of Appeals' finding that the plaintiff had satisfied this analysis. *Id.* at 802 n.13, 5 Fair Empl. Prac. Cas. (BNA) at 969 n.13. The Supreme Court agreed with the appellate court that the respondent had proved a prima facie case. *Id.* at 802, 5 Fair Empl. Prac. Cas. (BNA) at 969.

[11] *McDonnell Douglas*, 411 U.S. at 802–03, 5 Fair Empl. Prac. Cas. (BNA) at 969. The Court found that the employer's proffer that the plaintiff's illegal activity against it subsequent to his discharge was the cause for his rejection, was sufficient to satisfy its burden under the second prong. *Id.*

[12] *Id.* at 804–06, 5 Fair Empl. Prac. Cas. (BNA) at 970.

held that the plaintiff had a right to a re-trial on the issue of McDonnell Douglas' allegedly pretextual motives.[13]

In 1981, in *Texas Department of Community Affairs v. Burdine*, the United States Supreme Court clarified the second prong of the *McDonnell Douglas* Title VII analysis.[14] The *Burdine* Court held that while the employer in a Title VII action must articulate nondiscriminatory reasons for its actions, it does not have the burden of persuading the court that it was actually motivated by its proffered reasons.[15] Instead, the Court determined, it is sufficient that the employer merely raise a genuine issue of fact as to whether it discriminated against the complainant.[16] In *Burdine*, the plaintiff was fired by her employer during a general staff reduction, and although subsequently rehired into another division of the agency, she was not given the promotion she had applied for prior to her discharge.[17] The position she sought had been filled with a male employee from another division.[18] The plaintiff brought a Title VII action against her employer alleging gender discrimination.[19] The *Burdine* Court reasoned that the ultimate burden of persuasion in Title VII cases always rests with the complainant, and that the task of proving that a proffered explanation for employment decisions is false is not overly difficult.[20] Therefore, the Court clarified that under *McDonnell Douglas*, when the complainant has demonstrated a prima facie case of discrimination, the employer bears only the burden of clearly articulating nondiscriminatory reasons for its actions.[21]

In 1987, in *Chipollini v. Spencer Gifts, Inc.*, the United States Court of Appeals for the Third Circuit applied the *McDonnell Douglas-Burdine*

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[13] *Id.* at 805, 807, 5 Fair Empl. Prac. Cas. (BNA) at 970–71.

[14] *See Burdine*, 450 U.S. at 254–56, 25 Fair Empl. Prac. Cas. (BNA) at 116.

[15] *Id.* at 254, 25 Fair Empl. Prac. Cas. (BNA) at 116. The complainant at all times carries the ultimate burden of persuasion. *Id.* at 253, 25 Fair Empl. Prac. Cas. (BNA) at 115.

[16] *Id.* at 254, 25 Fair Empl. Prac. Cas. (BNA) at 116.

[17] *Id.* at 250–51, 25 Fair Empl. Prac. Cas. (BNA) at 114.

[18] *Id.*

[19] *Burdine*, 450 U.S. at 251, 25 Fair Empl. Prac. Cas. (BNA) at 114.

[20] *Id.* at 253, 258, 25 Fair Empl. Prac. Cas. (BNA) at 115, 117. The Court noted that a complainant is sufficiently aided by the fact that the employer's proffer must be clear and reasonably specific, that the employer will naturally want to persuade the fact finder that its actions were lawful, and that the plaintiff has access to the Equal Employment Opportunity Commission's investigatory files concerning plaintiff's complaint. *Id.* at 258, 25 Fair Empl. Prac. Cas. (BNA) at 117.

[21] *See id.* at 256–57, 260, 25 Fair Empl. Prac. Cas. (BNA) at 117, 118. The employer need only present evidence which would allow the trier of fact to conclude that no discriminatory animus affected the employment decision. *Id.* at 257, 25 Fair Empl. Prac. Cas. (BNA) at 117. An explanation by the employer of what it has done will satisfy the burden, so long as it evinces legitimate, nondiscriminatory reasons. *Id.* at 256, 25 Fair Empl. Prac. Cas. (BNA) at 117.

three-prong allocation of proof, and held that in the context of a summary judgment motion, the plaintiff's evidence need only support an inference that the employer's intentions were discriminatory, and need not necessarily lead to that conclusion.[22] The employee in *Chipollini*, a 58-year-old construction manager, was discharged purportedly due to the dissolution of his position and his diminished effectiveness on the job.[23] His duties and title, however, were soon assumed by his former assistant, an individual ten years his junior.[24] Additionally, the employee submitted evidence to the court contradicting his employer's position that his effectiveness had declined.[25] The court reasoned that since direct proof of discrimination is rarely available, evidence supporting an inference that the employer's proffered reason may be pretextual creates an issue of fact that cannot be resolved without a trial.[26] Thus, the Third Circuit held that since the plaintiff's evidence was sufficient to create an inference of pretext on the part of his employer, a trial was required.[27]

During the *Survey* year, in *Josey v. John R. Hollingsworth Corp.*, the United States Court of Appeals for the Third Circuit held that where a labor force reduction is the proffered reason for discharge of an employee, the trial court must closely examine the evidence relating to the employer's motives before granting summary judgment to the employer.[28] The *Josey* court determined that an African-American employee who was discharged as part of an alleged reduction-in-workforce put sufficient facts into evidence to successfully challenge his employer's proffered reason for his dismissal.[29] The court reasoned that Title VII could never be enforced during economic downturns if a

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[22] 814 F.2d 893, 897, 900–01, 43 Fair Empl. Prac. Cas. (BNA) 681, 684, 687–88 (3d Cir.), *cert. dismissed*, 483 U.S. 1052, 1052 (1987). The Third Circuit has found that circumstantial evidence relating to the defendant's credibility, the timing of an employee's discharge, and the employer's treatment of the employee may raise an inference of pretext sufficient to enable the employee's Title VII action to survive a motion for summary judgment. *See* Weldon v. Kraft, 896 F.2d 793, 799, 52 Fair Empl. Prac. Cas. (BNA) 355, 360 (3d Cir. 1990) (evidence of employer's treatment of employee may raise inference of pretext on part of employer); White v. Westinghouse Elec. Co., 862 F.2d 56, 62, 48 Fair Empl. Prac. Cas. (BNA) 597, 601 (3d Cir. 1988) (timing of employee's discharge raised issue of fact regarding employer's proffered reasons for discharging employee); *Chipollini*, 814 F.2d at 901, 43 Fair Empl. Prac. Cas. (BNA) at 688 (issue of pretext may turn on employer's credibility).

[23] *See* 814 F.2d at 895, 43 Fair Empl. Prac. Cas. (BNA) at 683.

[24] *Id.*

[25] *See id.* at 900, 43 Fair Empl. Prac. Cas. (BNA) at 687.

[26] *Id.* at 899–900, 43 Fair Empl. Prac. Cas. (BNA) at 686–87.

[27] *Id.* at 901, 43 Fair Empl. Prac. Cas. (BNA) at 688.

[28] 996 F.2d 632, 639–40, 642, 62 Fair Empl. Prac. Cas. (BNA) 221, 226–28 (3d Cir. 1993).

[29] *See id.* at 642, 62 Fair Empl. Prac. Cas. (BNA) at 228.

financial explanation could summarily absolve employers of liability for their discriminatory acts.[30] The *Josey* court explicitly articulated the principle that financial pressures cannot absolve an employer of liability for discriminatory employment decisions, or a court of the responsibility to closely examine facially legitimate proffers of pretext.[31]

In *Josey*, Ted Josey, an African-American, charged the John R. Hollingsworth Corporation ("Hollingsworth") with racial discrimination in violation of Title VII.[32] Josey began working for Hollingsworth, then a family-owned company, in 1976.[33] In 1978, the company promoted Josey to Supervisor of the second shift.[34] In 1982, the Hollingsworth family sold the company to thirteen key and trusted employees, all of whom were caucasian.[35] In 1987, Josey was promoted to Assistant Manager of Quality Assurance, making him the only black employee to hold an office position in the 30 year history of Hollingsworth.[36]

Upon promoting Josey to this management position, Ray White, a shareholder and the vice-president of Hollingsworth, instructed Robert Kirby, a shareholder and the Manager of Quality Assurance, to train Josey to succeed Kirby in the manager's position upon Kirby's upcoming retirement.[37] Kirby felt that Les Horvath, a shareholder who had sought to replace Kirby, should be his successor, and refused to train Josey.[38] White acknowledged that Kirby would be a problem during the transition, and imposed a training schedule on him which Kirby followed for only two weeks.[39]

According to the court, Josey believed that Kirby's intransigence was racially motivated.[40] Prior to the promotion, Kirby had remarked to Josey that a position could not be significant if an African-American could fill it; following the promotion, Kirby told employees that he

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[30] *Id.* at 640, 62 Fair Empl. Prac. Cas. (BNA) at 226.

[31] *See id.*

[32] *Id.* at 635, 62 Fair Empl. Prac. Cas. (BNA) at 222.

[33] *Josey*, 996 F.2d at 635, 62 Fair Empl. Prac. Cas. (BNA) at 222. Hollingsworth produces electrical equipment for the military. *Id.*

[34] *Id.*

[35] *Id.* By 1988, only seven shareholders remained. *Id.* at 636, 62 Fair Empl. Prac. Cas. (BNA) at 223. The company does not allow further transfers of the shares, but requires that shareholders wishing to redeem their shares must sell them back to the company, after which they will not be resold. *Id.* at 635, 62 Fair Empl. Prac. Cas. (BNA) at 222.

[36] *Id.*

[37] *Id.*

[38] *Josey*, 996 F.2d at 635, 62 Fair Empl. Prac. Cas. (BNA) at 223.

[39] *Id.* at 635, 636, 62 Fair Empl. Prac. Cas. (BNA) at 223, 224.

[40] *Id.* at 635, 62 Fair Empl. Prac. Cas. (BNA) at 223.

had Josey cutting out paper dolls as part of his training.[41] Other Hollingsworth employees indicated to Josey their belief that his promotion was racially based, and Josey received anonymous racial hate notes in his office.[42] In February of 1988, White terminated a manager suspected of leaving the notes, but cited economic concerns as the basis of the dismissal.[43] That month, White refused Josey's request for an unpaid leave of absence pending Kirby's retirement in March.[44]

According to Josey, in March or April of 1988, Hollingsworth's board of directors adopted a policy of preferring shareholders when layoffs occur.[45] The following May, Kirby postponed his retirement indefinitely, and White discharged Josey citing economic concerns and claiming that there was no other position where the company could use him at his current pay level.[46] Horvath was to replace Josey as Assistant Manager of Quality Assurance, despite the fact that he was paid a higher salary than Josey.[47] A less-experienced caucasian employee was chosen to fill Josey's former position as second shift Supervisor, and remained with the company even after the elimination of the second shift.[48] In the summer of 1988, Kirby announced that he would retire at the end of the year, and Horvath, whose engineering position was to be eliminated, was designated as his replacement.[49]

Josey filed a complaint with the Equal Employment Opportunity Commission, which dismissed the claim and issued a right to sue.[50] Josey then filed a Title VII action in the United States District Court for the Eastern District of Pennsylvania.[51] The district court granted summary judgment for Hollingsworth, holding that Josey had failed to meet his evidentiary burden following Hollingsworth's proffer of a legitimate economic reason for its action.[52] The court found that

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[41] *Id.*

[42] *Id.*

[43] *Josey*, 996 F.2d at 635, 62 Fair Empl. Prac. Cas. (BNA) at 223.

[44] *Id.*

[45] *Id.* By 1988 only seven of the original thirteen shareholders remained, three of whom were Kirby, Horvath, and White. *Id.* at 636, 62 Fair Empl. Prac. Cas. (BNA) at 223.

[46] *Id.* Due to economic difficulties stemming from downturns in the defense industry, Hollingsworth, which had at one time employed 450 people, had reduced its labor force to approximately 175 by 1988. *Id.*

[47] *Id.*

[48] *Josey*, 996 F.2d at 636, 62 Fair Empl. Prac. Cas. (BNA) at 223.

[49] *Id.*

[50] *Id.*

[51] *Id.* Josey also alleged a disparate impact claim which was rejected by the district court because Josey failed to raise it until after the close of discovery. *Id.* at 636, 62 Fair Empl. Prac. Cas. (BNA) 224.

[52] *See id.* at 636, 62 Fair Empl. Prac. Cas. (BNA) at 223.

Hollingsworth's proffer was fully supported, and that White, as the sole decision-maker, earnestly desired to replace Kirby with Josey.[53] The district court concluded, therefore, that a finding of discriminatory intent was extremely implausible, and granted Hollingsworth's motion for summary judgment.[54]

On appeal, the United States Court of Appeals for the Third Circuit reversed the lower court's ruling and held that the indirect evidence presented by Josey raised issues of fact that could not be decided at the summary judgment stage.[55] The *Josey* court agreed with the lower court that, as required by the first prong of *McDonnell Douglas*' burden of proof allocation, Josey had established a prima facie case of discrimination; thus, Josey had created a presumption of discriminatory intent to be rebutted by Hollingsworth.[56] The court also agreed that, by proffering economic difficulties precipitating a reduction-in-force, Hollingsworth had satisfied the second-prong burden, as clarified by *Burdine*, to articulate a legitimate, nondiscriminatory reason for Josey's dismissal.[57] The *Josey* court held, however, that in analyzing Josey's evidence under the third prong of *McDonnell Douglas*, the district court had not examined the facts closely enough for inconsistencies weighing in the plaintiff's favor.[58] The Third Circuit reasoned that, while a court may find economic difficulties to be a plausible, legitimate reason for discharging an employee, a court must still closely review the evidence in the light most favorable to the plaintiff to discern whether a fact finder could infer a discriminatory intent by the employer.[59] Therefore, the *Josey* court held that where financial difficulties are proffered by the employer, the court is obligated to closely examine the evidence before denying the complainant a trial by jury.[60]

Upon analyzing the evidence, the *Josey* court found that several inconsistencies called Hollingsworth's proffered reasons into question.[61] The court found that since Hollingsworth denied Josey's request for temporary leave without pay, a fact finder could question the credibility of Hollingsworth's proffer that it discharged Josey for finan-

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[53] Josey v. John R. Hollingsworth Corp., No. 91–4606, 1992 WL 78838, at *3 (E.D. Pa. Apr. 9, 1992).

[54] *Id.*

[55] *Josey*, 996 F.2d at 642, 62 Fair Empl. Prac. Cas. (BNA) at 228.

[56] *Id.* at 638, 62 Fair Empl. Prac. Cas. (BNA) at 225.

[57] *Id.*

[58] *Id.* at 639–40, 62 Fair Empl. Prac. Cas. (BNA) at 226.

[59] *Id.*, 62 Fair Empl. Prac. Cas. (BNA) at 226–27.

[60] *Josey*, 996 F.2d at 640, 62 Fair Empl. Prac. Cas. (BNA) at 226.

[61] *See id.* at 640–41, 62 Fair Empl. Prac. Cas. (BNA) at 226–28.

cial reasons.[62] Additionally, Horvath assumed Josey's position upon his discharge, despite White's assertion that the job was no longer necessary; furthermore, a less-experienced caucasian replaced Josey as second shift Supervisor, and remained with Hollingsworth even after the elimination of the second shift.[63] The court also reasoned that the credibility of Kirby's decision to postpone his retirement should be judged at trial, and not in the context of a motion for summary judgment.[64] Finally, the court questioned the lower court's finding that White had closely monitored Josey's training by Kirby, in light of the fact that White did not know that Kirby had abandoned the training after two weeks, even after Josey's request for unpaid leave.[65]

In addition to finding a genuine issue regarding Hollingsworth's credibility, the *Josey* court determined that the timing of Josey's discharge, in relation to several other events, raised material issues of fact.[66] The court reasoned that Hollingsworth's policy of preferring shareholders was adopted shortly before Josey's dismissal; furthermore, while Hollingsworth had reduced its workforce from 450 to 175 employees by 1988, the preference policy was only instituted in March or April of 1988.[67] The court also reasoned that a fact finder might find that Kirby's retirement announcement, made so soon after Josey's dismissal, was evidence of pretext.[68]

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[62] *Id.* at 638–39, 640, 62 Fair Empl. Prac. Cas. (BNA) at 225–26, 227. The Court relied on *Chipollini v. Spencer Gifts*, where the Third Circuit found that the determination of an employer's credibility cannot be determined in the context of a motion for summary judgment, but must be addressed at trial. *See* 814 F.2d 893, 901, 43 Fair Empl. Prac. Cas. (BNA) 681, 688 (3d Cir. 1987).

[63] *Josey*, 996 F.2d at 640, 62 Fair Empl. Prac. Cas. (BNA) at 226.

[64] *Id.* at 641, 62 Fair Empl. Prac. Cas. (BNA) at 227.

[65] *Id.* 62 Fair Empl. Prac. Cas. (BNA) at 228.

[66] *Id.* at 638–39, 640, 641, 62 Fair Empl. Prac. Cas. (BNA) at 225–26, 227. The court relied on *White v. Westinghouse Electric Co.*, where the Third Circuit held that the timing of an employee's discharge raised an issue of fact regarding the employer's proffered reasons for the discharge. 862 F.2d 56, 62, 48 Fair Empl. Prac. Cas. (BNA) 597, 601 (3d Cir. 1988). The employee in *White* was dismissed during a reduction-in-force when he was only three months shy of having served thirty years with the company. *Id.* at 58, 48 Fair Empl. Prac. Cas. (BNA) at 598. Had he reached the thirty-year milestone, he would have been entitled to special retirement benefits and the option of retiring at a younger age than is customarily allowed. *Id.* at 58–59, 48 Fair Empl. Prac. Cas. (BNA) at 598. The employee sued under Title VII alleging age discrimination. *See id.* The court reasoned that where the decision to discharge or retain an employee includes a close connection between the employee's age and wages, the issue of pretext must be considered. *See id.* at 62, 48 Fair Empl. Prac. Cas. (BNA) at 601. Therefore, since the timing of the employee's termination raised a genuine issue of fact as to whether the employer's reasons were merely pretextual, the court concluded that summary judgment could not be granted and that a trial was required. *Id.*

[67] *Josey*, 996 F.2d at 640, 62 Fair Empl. Prac. Cas. (BNA) at 227.

[68] *Id.* at 640, 641, 62 Fair Empl. Prac. Cas. (BNA) at 227.

Concentrating on a third body of indirect evidence presented by Josey, the *Josey* court found that evidence illustrating Josey's treatment at Hollingsworth was sufficient to raise an inference of discriminatory animus.[69] The court reasoned that without more information about the decision-making process at Hollingsworth, the fact that the person suspected of leaving derogatory notes was a manager could evince the true position of the company with respect to African-American employees.[70] Similarly, Kirby's racial remarks to Josey and Kirby's flaunting of his intransigence in front of the other employees could suggest that management encouraged an atmosphere of racial prejudice within the company.[71] Thus, the court held that Josey's treatment at Hollingsworth, along with the credibility of the company's managers and officers, and the timing of its decisions, could allow a fact finder to conclude that Hollingsworth's proffered reasons for dismissing Josey were pretextual.[72]

Josey is not inconsistent with prior Third Circuit opinions, or with the holdings of the other circuits.[73] Reductions-in-force have been widely recognized as providing a legitimate reason for discharging

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[69] *Id.* at 641, 62 Fair Empl. Prac. Cas. (BNA) at 227.

[70] *Id.* The court of appeals felt that the district court should have further explored the decision-making structure of Hollingsworth. *Id.* The court relied on *Weldon v. Kraft, Inc.*, where the Third Circuit held that evidence of an employer's treatment of an employee may call into question an employer's proffer of nondiscriminatory reasons for the employee's discharge. *See* 896 F.2d 793, 799, 52 Fair Empl. Prac. Cas. (BNA) 355, 360 (3d Cir. 1990). In *Weldon*, the plaintiff was an African-American employee allegedly discharged for poor work performance, failing to produce adequate documentation explaining his absence from work, and failing to follow company policy regarding the return of unused business-trip advance money. *Id.* at 794, 52 Fair Empl. Prac. Cas. (BNA) at 356. Disputing these proffers, the plaintiff contended that his supervisor had a history of difficulty in dealing with African-American employees, and that the employer treated African-American employees more harshly than white employees. *See id.* at 794–96, 52 Fair Empl. Prac. Cas. (BNA) at 356–58. Although the court found this to be a close case, it reasoned that if a fact finder were to credit the plaintiff's testimony regarding the harsh treatment given to African-Americans at Kraft, it could conclude that Kraft's reasons were mere pretexts. *Id.* at 799, 52 Fair Empl. Prac. Cas. (BNA) at 360. Thus, the court held that a trial was required to determine whether the treatment of African-American employees at Kraft could reveal pretextual motives on Kraft's part. *See id.* at 799, 801, 52 Fair Empl. Prac. Cas. (BNA) at 360, 361.

[71] *Josey*, 996 F.2d at 641, 62 Fair Empl. Prac. Cas. (BNA) at 227.

[72] *Id.* at 641, 62 Fair Empl. Prac. Cas. (BNA) at 227–28.

[73] *See, e.g.*, Bell v. AT&T, 946 F.2d 1507, 1511, 57 Fair Empl. Prac. Cas. (BNA) 181, 185 (10th Cir. 1991) (employer must assert legitimate justification for leaving certain employees out of group susceptible to termination in reduction-in-force); Barnes v. GenCorp, 896 F.2d 1457, 1474, 1475, 56 Fair Empl. Prac. Cas. (BNA) 1203, 1217 (6th Cir.), *cert. denied*, 498 U.S. 878, 878 (1990) (employer cannot avoid liability for discriminatory discharge of employee merely by characterizing action as reduction-in-force); *White*, 862 F.2d at 62, 48 Fair Empl. Prac. Cas. (BNA) at 601 (reduction-in-force does not insulate employer from Title VII liability); Chipollini v. Spencer Gifts, 814 F.2d 893, 901, 43 Fair Empl. Prac. Cas. (BNA) 681, 688 (3d Cir. 1987) (employer's proffered reason of general reduction-in-force vulnerable to challenge in Title VII action).

employees, and nowhere have they been held to create a veil of absolution for employers who use them to accomplish discriminatory ends.[74] *Josey*'s significance lies in the Third Circuit's explicit mandate that, when employers proffer reductions-in-force in Title VII actions, a thorough analysis of the facts must ensue to reveal any possible factual issues that require a trial on the merits.[75]

It does not seem likely that *Josey* will have a marked effect on the ultimate decisions reached by Third Circuit courts in Title VII reduction-in-force cases. That is to say that *Josey* will not lessen the plaintiff's ultimate burden of proof at trial, even though the case directs district courts to look more closely for material issues of fact at the summary judgment stage than they might in cases not involving the reduction-in-force proffer.[76] Ultimately, the impact of *Josey* will probably be manifested by an increase in reduction-in-force cases that survive summary judgment.

Where the *McDonnell Douglas-Burdine* allocation of proof reduces the effort required of Title VII defendants at the summary judgment stage, by requiring that they merely need to clearly articulate their nondiscriminatory reasons for acting, *Josey* serves to increase that burden if summary judgment for the defendant is to be realized.[77] In order to ensure summary judgment, a defendant employer may be forced into a more rigorous battle to demonstrate that no material issues of fact exist. Ultimately, if a strict construction of *Josey* is adhered to, it is possible that any employer who engages in a reduction-in-workforce for economic reasons may find itself unable to dismiss a Title VII action through summary judgment. Therefore, the cost of going to trial may be a more prominent factor in employers' decisions to discharge minorities during times of financial hardship. This result is to be welcomed by the courts and society, for it will encourage employers to evaluate their true motives for discharging employees during reductions-in-force.

In sum, the Third Circuit, in *Josey*, held that in Title VII discrimination cases where the defendant employer proffers economic hardships resulting in a reduction-in-workforce, the district court must closely examine the evidence for material issues of fact requiring a trial.[78] The court reasoned that Title VII would be rendered ineffective

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[74] *See supra* note 73 and accompanying text.

[75] *See Josey*, 996 F.2d at 640, 62 Fair Empl. Prac. Cas. (BNA) at 226.

[76] *See id.*

[77] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254, 25 Fair Empl. Prac. Cas. (BNA) 113, 116 (1981).

[78] *Josey*, 996 F.2d at 640, 62 Fair Empl. Prac. Cas. (BNA) at 226.

if financial difficulties could provide a veil of immunity for employers, and its conclusion was fully in accord with the practices of the other circuits.[79] By explicitly mandating that a closer look be taken at the material issues of fact that might arise in reduction-in-force cases, *Josey* may reduce the number of Third Circuit cases that are disposed of by summary judgment, and thus influence employers to consider the reasons behind their employment decisions more circumspectly.

IV. National Origin Discrimination

A. **Ninth Circuit Overrules EEOC English-Only Guidelines in* Garcia v. Spun Steak Co.[1]

Title VII of the Civil Rights Act of 1964 ("Title VII") makes it an unlawful employment practice for an employer to discriminate against any individual with respect to the terms or conditions of employment because of such individual's race, color, religion, sex or national origin.[2] Title VII makes no reference to discrimination on the basis of language.[3] The Equal Employment Opportunity Commission ("EEOC") has, however, in its Guidelines on Discrimination Because of National Origin ("Guidelines"), stated that an employer's speak-English-only rule establishes a prima facie case of national origin discrimination under the disparate impact theory of employment discrimination.[4]

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[79] *See supra* note 73 and accompanying text.

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[1] 998 F.2d 1480, 62 Fair Empl. Prac. Cas. (BNA) 525 (9th Cir. 1993).

[2] Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (1988) provides:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely effect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

[3] Juan F. Perea, *English-Only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 J.L. Reform 265, 273 (1900).

[4] 29 C.F.R. § 1606.7 (1993) provides in pertinent part:

> Speak-English-only rules
>
> (a) *When applied at all times.* A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their

The two most prevalent theories for proving discrimination under Title VII are disparate treatment and disparate impact.[5] In a disparate treatment context, the employee makes out a prima facie case by evidence giving rise to an inference of discriminatory intent.[6] In the disparate impact context, on the other hand, intent is irrelevant.[7] A plaintiff makes out a prima facie case under disparate impact theory by pointing to a facially neutral practice which has a disproportionate impact on members of a protected group.[8] If an employment practice does have discriminatory disparate impact, it violates Title VII unless it can be justified by business necessity.[9]

In 1980, in *Garcia v. Gloor*, the United States Court of Appeals for the Fifth Circuit held that the mere existence of an employer's English-only rule, as applied to bilingual Hispanic employees, was insufficient to establish a prima facie case of national origin discrimination.[10] Garcia, a bilingual Mexican-American, was a salesman for Gloor Lumber and Supply, which had a rule prohibiting employees from

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> primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates title VII and will closely scrutinize it.
>
> (b) *When applied only at certain times.* An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.

Id. The EEOC interprets 29 C.F.R. § 1606.7 as creating a presumption of disparate impact discrimination, not disparate treatment. Equal Employment Opportunity Comm'n, 2 EEOC Compliance Manual § 623.6 (1984).

[5] Ward's Cove Packing Co. v. Atonio, 490 U.S. 642, 668 n.13, 49 Fair Empl. Prac. Cas. (BNA) 1519, 1530 n.13 (1989) (Stevens, J., dissenting).

[6] *Id.* at 666–67, 49 Fair Empl. Prac. Cas. (BNA) at 1529–30. If discriminatory intent is proven, the employer is in violation of Title VII unless it can show that the discriminatory treatment is necessary as a bona fide occupational qualification. Gutierrez v. Municipal Court, 838 F.2d 1031, 1038, 51 Fair Empl. Prac. Cas. (BNA) 435, 439 (9th Cir.), *en banc reh'g denied*, 861 F.2d 1187, 51 Fair Empl. Prac. Cas. (BNA) 452 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016, 51 Fair Empl. Prac. Cas. (BNA) 457 (1989). Disparate treatment exists when an employer intentionally treats some employees less favorably than others because of their membership in a protected group. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15, 14 Fair Empl. Prac. Cas. (BNA) 1514, 1519 n.15 (1977).

[7] *Teamsters*, 431 U.S. at 335 n.15, 14 Fair Empl. Prac. Cas. (BNA) at 1519 n.15.

[8] Connecticut v. Teal, 457 U.S. 440, 446, 29 Fair Empl. Prac. Cas. (BNA) 1, 4 (1982).

[9] Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1117, 62 Fair Empl. Prac. Cas. (BNA) 1484, 1488 (11th Cir. 1993). Disparate impact was originally a judicially established theory of action. *See Ward's Cove*, 490 U.S. at 665, 49 Fair Empl. Prac. Cas. (BNA) at 1529 (Stevens, J., dissenting). Disparate impact has since been codified at 42 U.S.C. § 2000e-2(k) (Supp. III 1991).

[10] 618 F.2d 264, 272, 22 Fair Empl. Prac. Cas. (BNA) 1403, 1409 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113, 24 Fair Empl. Prac. Cas. (BNA) 1220 (1981).

speaking Spanish on the job unless they were communicating with Spanish-speaking customers.[11] The *Gloor* court reasoned that language was not, at least for a bilingual employee, an immutable characteristic of national origin.[12] The court further reasoned that Garcia, who was bilingual, could easily comply with the rule, and that there was no disparate impact when the affected employee could readily observe the rule and nonobservance was a matter of individual preference.[13] The court, therefore, concluded that Garcia had failed to establish a prima facie claim of disparate impact discrimination.[14]

Subsequent to *Gloor*, and in response to it,[15] the EEOC in 1980 adopted Guidelines which stated that the mere existence of an English-only rule established a prima facie case of disparate impact.[16] According to the Guidelines, an English-only rule is a burdensome term and condition of employment because language is often an essential national origin characteristic.[17] The EEOC's interpretation of Title VII through its Guidelines stood in opposition to *Gloor*'s holding, because the EEOC presumed a Title VII violation regardless of bilingual fluency.[18]

In 1987, in *Jurado v. Eleven-Fifty Corp.*, the United States Court of Appeals for the Ninth Circuit held that Title VII does not bar an employer from enforcing a limited business-related English-only rule against a bilingual employee.[19] Jurado was a Mexican-American radio announcer who, for programming reasons, was ordered not to speak Spanish on the air.[20] The court reasoned that the English-only order did not constitute disparate treatment because it was motivated by business considerations, not racial animus.[21] Citing *Gloor*, the court

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[11] *Id.* at 266, 22 Fair Empl. Prac. Cas. (BNA) at 1404.

[12] *Id.* at 270, 22 Fair Empl. Prac. Cas. (BNA) at 1408. Title VII is violated only when discrimination is based on traits, such as skin color or sexual anatomy, which are beyond the power of the employee to alter. *Id.* at 269, 22 Fair Empl. Prac. Cas. (BNA) at 1407. The court did recognize, however, that for a monolingual speaker, language might be an immutable characteristic. *Id.* at 270, 22 Fair Empl. Prac. Cas. (BNA) at 1408.

[13] *Id.* at 270, 22 Fair Empl. Prac. Cas. (BNA) at 1407.

[14] *Id.* at 270, 272, 22 Fair Empl. Prac. Cas. (BNA) at 1407, 1409.

[15] Comment, *Language Rights and the Legal Status of English-Only Laws in the Public and Private Sector*, 20 N.C. CENT. L.J. 65, 78 n.120 (1992) ("According to Mr. Robert T. Olmos, who helped draft the EEOC guidelines, they were directly in response to the Gloor decision.").

[16] *See* Perea, *supra* note 3.

[17] *Id.*

[18] Gutierrez v. Municipal Court, 861 F.2d 1187, 1189 & n.2, 51 Fair Empl. Prac. Cas. (BNA) 452, 454 & n.2 (9th Cir. 1988) (denial of application for rehearing en banc) (Kozinski, J., dissenting).

[19] 813 F.2d 1406, 1411, 43 Fair Empl. Prac. Cas. (BNA) 870, 873–74 (9th Cir. 1987).

[20] *Id.* at 1408, 43 Fair Empl. Prac. Cas. (BNA) at 871–72.

[21] *Id.* at 1409, 1410, 43 Fair Empl. Prac. Cas. (BNA) at 872, 873.

further stated that Jurado had failed to make out a disparate impact claim because he was fluently bilingual and could easily comply with the order.[22]

In 1988, in *Gutierrez v. Municipal Court*, the United States Court of Appeals for the Ninth Circuit held that the existence of an English-only rule did establish a prima facie case of disparate impact.[23] Gutierrez was a bilingual clerk employed by a municipal court which forbade employees to speak Spanish except when acting as translators, or during breaks.[24] The *Gutierrez* court distinguished *Jurado*'s disparate impact holding as turning not on the failure to allege a prima facie case, but rather on the business necessity of the English-only rule.[25] The *Gutierrez* court reasoned that an employee's primary language is an important national origin characteristic, and that a rule restricting its use impinges on an employee's ethnic identity.[26] The court therefore expressed its agreement with the Guidelines that English-only rules can be presumed to have an adverse impact on bilingual employees and are valid only if justified by business necessity.[27]

In 1988, Gutierrez's employer petitioned for rehearing en banc and was denied.[28] Judge Kozinski in dissent, however, argued that *Gutierrez* had misinterpreted *Jurado*.[29] He pointed out that in its discussion of disparate impact the *Jurado* court had relied exclusively on *Gloor*, which had rejected the business necessity test.[30] In 1989 the Supreme Court granted certiorari to *Municipal Court v. Gutierrez* and vacated the Appeals Court's judgement as moot.[31] *Jurado* remained good law in the Ninth Circuit, but it was unclear what *Jurado*'s view of

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[22] *Id.* at 1412, 43 Fair Empl. Prac. Cas. (BNA) at 875.

[23] 838 F.2d 1031, 1040–41, 51 Fair Empl. Prac. Cas. (BNA) 435, 440–41 (9th Cir.), *en banc reh'g denied*, 861 F.2d 1187, 51 Fair Empl. Prac. Cas. (BNA) 452 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016, 51 Fair Empl. Prac. Cas. (BNA) 457 (1989).

[24] *Id.* at 1036, 51 Fair Empl. Prac. Cas. (BNA) at 437.

[25] *Id.* at 1041 & n.13, 51 Fair Empl. Prac. Cas. (BNA) at 441 & n.13.

[26] *See id.* at 1039, 51 Fair Empl. Prac. Cas. (BNA) at 439.

[27] *Id.* at 1040, 51 Fair Empl. Prac. Cas. (BNA) at 440.

[28] Gutierrez v. Municipal Court, 861 F.2d 1187, 51 Fair Empl. Prac. Cas. (BNA) 452 (9th Cir. 1988).

[29] *Id.* at 1190–91, 51 Fair Empl. Prac. Cas. (BNA) at 454–55 (Kozinski, J., dissenting).

[30] *Id.* at 1190, 51 Fair Empl. Prac. Cas. (BNA) at 454. Judge Kozinski, therefore, argued that *Gutierrez* was particularly appropriate for en banc consideration because it created both an inter-circuit conflict with *Gloor*, and an intra-circuit conflict with *Jurado*. *Id.* at 1188, 51 Fair Empl. Prac. Cas. (BNA) at 452.

[31] Municipal Court v. Gutierrez, 490 U.S. 1016, 51 Fair Empl. Prac. Cas. (BNA) 457 (1989). It appears *Gutierrez* was vacated because the employee was no longer working for the Municipal Court. *See* Brief for Petitioner at 7, *Gutierrez*, 490 U.S. 1016, 51 Fair Empl. Prac. Cas. (BNA) 457 (1989) (No. 88–1395).

the law was.[32] On the one hand, *Gutierrez* had construed *Jurado* as endorsing the guidelines and the EEOC's view.[33] According to this view of *Jurado*, an English-only rule constituted discriminatory disparate impact, even as applied to bilingual employees, except upon a showing of business necessity.[34] On the other hand, Judge Kozinski had interpreted *Jurado* as an endorsement of *Gloor*, and an implicit rejection of the guidelines.[35]

During the *Survey* year, in *Garcia v. Spun Steak Co.*, the United States Court of Appeals for the Ninth Circuit explicitly rejected the Guidelines and held that an English-only rule as applied to bilingual employees was not a prima facie violation of Title VII.[36] In *Spun Steak*, two Hispanic employees claimed that their employer's imposition of an English-only rule violated Title VII by producing a disproportionate adverse effect on their national origin group.[37] The *Spun Steak* court reasoned that the prerogative to converse at work was a privilege granted by the employer, which the employer has the right to circumscribe if doing so does not result in denying the privilege to members of a protected group.[38] Thus, an employer imposing a speak-English-only rule is liable under Title VII only with respect to those employees who have such limited proficiency in English that the rule effectively denies them the privilege of conversing on the job.[39]

Spun Steak Co. employed thirty-three workers, twenty-four of whom were Hispanic Spanish-speakers.[40] Two employees spoke no English.[41] The remainder had varying degrees of English proficiency.[42] In response to reports that plaintiffs Priscilla Garcia and Maricela Buitrago were using their bilingual capabilities to harass and insult other workers in a language they could not understand, Spun Steak promulgated a rule prohibiting the speaking of Spanish during working hours.[43] In November 1990, plaintiffs Garcia and Buitrago received

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[32] Although *Gloor* and the Guidelines are facially contradictory, the *Jurado* court cited both approvingly. 813 F.2d at 1411, 43 Fair Empl. Prac. Cas. (BNA) at 873–74.

[33] *Gutierrez*, 838 F.2d at 1041 & n.13, 51 Fair Empl. Prac. Cas. (BNA) at 441 & n.13.

[34] *See id.*

[35] *Gutierrez*, 861 F.2d at 1190, 51 Fair Empl. Prac. Cas. (BNA) at 454 (denial of application for rehearing en banc) (Kozinski, J., dissenting).

[36] 998 F.2d 1480, 1489, 1490, 62 Fair Empl. Prac. Cas. (BNA) 525, 533 (9th Cir. 1993).

[37] *Id.* at 1484, 1485, 62 Fair Empl. Prac. Cas. (BNA) at 528, 529.

[38] *See id.* at 1487–88, 62 Fair Empl. Prac. Cas. (BNA) at 531–32.

[39] *Id.* at 1488, 62 Fair Empl. Prac. Cas. (BNA) at 532.

[40] *Id.* at 1483, 62 Fair Empl. Prac. Cas. (BNA) at 527.

[41] *Spun Steak*, 998 F.2d at 1483, 62 Fair Empl. Prac. Cas. (BNA) at 527.

[42] *Id.*

[43] *Id.* at 1483, 62 Fair Empl. Prac. Cas. (BNA) at 527–28. The same justification had been

warning letters for speaking Spanish during working hours.[44] For two months thereafter they were not permitted to work next to each other.[45]

Garcia, Buitrago and Local 115, United Food and Commercial Workers International Union, AFL-CIO (hereinafter "the employees") filed a complaint with the EEOC claiming that Spun Steak had violated Title VII by enforcing its English-only rule.[46] Upon investigation, the EEOC found reasonable cause to believe that Spun Steak's English-only rule violated Title VII.[47] The employees subsequently filed suit in the United States District Court for the Northern District of California.[48] The district court granted the employees' motion for summary judgement, concluding that the English-only policy disparately impacted Hispanic workers without sufficient business justification, and thus violated Title VII.[49] Spun Steak appealed the grant of summary judgement to the United States Court of Appeals for the Ninth Circuit.[50]

The Ninth Circuit held, as a threshold matter, that a discrimination claim being brought under Title VII section 703(a)(1) could be pursued under disparate impact theory.[51] The court reasoned that because the employees' claim focused on terms, conditions and privileges of employment, it was necessarily a claim under Title VII section 703(a)(1), not (a)(2).[52] The court noted that the disparate impact cause of action developed out of the language in section 703(a)(2) prohibiting discriminatory denial of employment opportunities.[53] Nevertheless, the court noted that the United States Supreme Court had instructed that the language of section 703(a)(1) be read broadly.[54]

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offered by the employer in *Gutierrez*. 838 F.2d at 1042, 51 Fair Empl. Prac. Cas. (BNA) at 442. The Spun Steak Company's rule provided, in pertinent part:

> [I]t is hereafter the policy of this Company that only English will be spoken in connection with work. During lunch, breaks, and employees' own time, they are obviously free to speak Spanish if they wish. However, we urge all of you not to use your fluency in Spanish in a fashion which may lead other employees to suffer humiliation.

Spun Steak, 998 F.2d at 1483, 62 Fair Empl. Prac. Cas. (BNA) at 528.

[44] *Spun Steak*, 998 F.2d at 1483, 62 Fair Empl. Prac. Cas. (BNA) at 528.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 1483–84, 62 Fair Empl. Prac. Cas. (BNA) at 528.

[48] *Id.* at 1482, 1484, 62 Fair Empl. Prac. Cas. (BNA) at 527, 528.

[49] *Spun Steak*, 998 F.2d at 1484, 62 Fair Empl. Prac. Cas. (BNA) at 528.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Spun Steak*, 998 F.2d at 1485, 62 Fair Empl. Prac. Cas. (BNA) at 529.

The court, therefore, concluded that there was no reason not to allow section 703(a)(1) claims to proceed under a disparate impact theory.[55]

The *Spun Steak* majority then articulated the elements of a section 703(a)(1) disparate impact claim.[56] In order to establish a prima facie case, the plaintiff must identify a facially neutral employment practice which 1) has a significant adverse effect on the terms, conditions or privileges of employment of a protected class, and 2) redounds disproportionately on the protected class as compared to the general employee population.[57] The majority conceded that if the English-only rule produced significant adverse effects, those effects would redound disproportionately on the Hispanic workers.[58] The employees argued that the English-only rule had significant adverse effects on them in three ways: 1) it denied them a privilege of employment that was enjoyed by monolingual English-speakers; 2) it denied them the ability to express their cultural heritage on the job; and 3) it created an atmosphere of inferiority, isolation and intimidation.[59] The *Spun Steak* majority rejected all three arguments.[60]

First, the employees argued that the rule denied them a privilege given by the employer to native English-speakers: the ability to converse at work in the language with which they felt most comfortable.[61] The majority reasoned that the prerogative to converse at work was a privilege granted at the employer's discretion.[62] The employer, therefore, had the right to define the privilege's contours.[63] The majority found that Spun Steak had granted its employees a privilege to converse at work, not a privilege to converse at work in the language with which they felt most comfortable.[64] The majority reasoned that for bilingual employees, who could readily comply with the rule, the slight inconvenience of having to converse in English rather than Spanish did not amount to a withdrawal of the privilege to converse.[65] The majority further reasoned that merely hampering the enjoyment of a privilege

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[55] *Id.*

[56] *Id.* at 1486, 62 Fair Empl. Prac. Cas. (BNA) at 530.

[57] *Id.*

[58] *Id.*

[59] *Spun Steak*, 998 F.2d at 1486–87, 62 Fair Empl. Prac. Cas. (BNA) at 530–31.

[60] *Id.* at 1487, 1488, 1489, 62 Fair Empl. Prac. Cas. (BNA) at 531, 532.

[61] *Id.* at 1487, 62 Fair Empl. Prac. Cas. (BNA) at 531.

[62] *Id.* The court thus departed from the reasoning in *Gloor*, which had specifically stated that "[a]n employer's failure to forbid employee's to speak English does not grant them a privilege." *Gloor*, 618 F.2d at 269, 22 Fair Empl. Prac. Cas. (BNA) at 1406.

[63] *Spun Steak*, 998 F.2d at 1487, 62 Fair Empl. Prac. Cas. (BNA) at 531.

[64] *Id.*

[65] *Id.* at 1488, 62 Fair Empl. Prac. Cas. (BNA) at 531–32.

was not sufficient adverse impact to constitute a violation of Title VII.[66] Consequently, the majority concluded that only with respect to those employees with such limited proficiency in English that the rule effectively denied them the privilege of conversing on the job could it be said there was a significant adverse impact in violation of Title VII.[67]

Second, the employees argued that the English-only rule denied them the right to cultural expression.[68] The *Spun Steak* majority reasoned, however, that Title VII was concerned only with disparities in the treatment of workers.[69] The employees' desire to engage in cultural expression at work, the majority stated, was a substantive privilege outside the ambit of Title VII.[70]

Finally, the employees argued that the English-only rule created an atmosphere of inferiority, isolation and intimidation by infusing the work environment with racial tensions.[71] Although the majority conceded that hostile working conditions could amount to a burdensome condition of employment in violation of Title VII, the majority held that the existence of the rule in and of itself did not prove the existence of such conditions.[72] In a disparate impact case, the majority noted, the employee must not merely raise an inference of discrimination, but must prove the alleged discriminatory effect.[73] The existence of a hostile working environment, the majority reasoned, was a question of fact for which a per se rule was particularly inappropriate.[74] The majority observed that Spun Steak's English-only rule had in fact been adopted to promote racial harmony by preventing employees from harassing members of other ethnic groups.[75] Thus, the mere existence of the English-only rule, the majority concluded, was insufficient to prove the existence of a hostile work environment in violation of Title VII.[76]

Having rejected all three of the employees' arguments, the *Spun Steak* majority concluded that the bilingual employees of Spun Steak, had not made out a prima facie case of Title VII discrimination.[77] In

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[66] *Id.* at 1488, 62 Fair Empl. Prac. Cas. (BNA) at 531.
[67] *Id.* at 1488, 62 Fair Empl. Prac. Cas. (BNA) at 532.
[68] *Spun Steak*, 998 F.2d at 1487, 62 Fair Empl. Prac. Cas. (BNA) at 531.
[69] *Id.*
[70] *Id.*
[71] *Id.* at 1488, 62 Fair Empl. Prac. Cas. (BNA) at 532.
[72] *Id.* at 1488, 1489, 62 Fair Empl. Prac. Cas. (BNA) at 532.
[73] *Spun Steak*, 998 F.2d at 1486, 1490, 62 Fair Empl. Prac. Cas. (BNA) at 530, 533.
[74] *Id.* at 1489, 62 Fair Empl. Prac. Cas. (BNA) at 532.
[75] *Id.*
[76] *Id.*
[77] *Id.* at 1490, 62 Fair Empl. Prac. Cas. (BNA) at 533.

so holding, the majority recognized that it was rejecting the EEOC Guidelines, which provided that an employee may make out a prima facie case of disparate impact discrimination by merely proving the existence of an English-only rule.[78] Although the majority conceded that administrative interpretations are generally entitled to judicial deference, the majority noted that the judiciary is not bound by those interpretations.[79] Finding nothing in the plain language of the statute to support the EEOC's view, the majority, relying on Title VII's legislative history, indicated that Title VII should be interpreted narrowly.[80] The majority added that the United States Supreme Court had held that a plaintiff in a disparate impact case must prove the alleged discriminatory effect.[81] The majority, therefore, concluded that the Guidelines, by allowing the employee a prima facie case on an inference of discrimination grounded in the mere existence of an English-only rule, contravened the Supreme Court's prior holding.[82]

Judge Boochever in a dissenting opinion agreed with the *Spun Steak* majority except for its rejection of the Guidelines.[83] Judge Boochever argued that the Guidelines should be deferred to in this case.[84] Because it is difficult to prove a hostile working environment other than by self-serving statements, Judge Boochever stated that the EEOC's presumption that an English-only rule creates a hostile environment should be enough to establish a prima facie case.[85]

The courts in *Gloor* and *Gutierrez* differed in their understanding of the burden an English-only rule imposes on bilingual employees. In *Gloor*, the burden was measured by the difficulty an employee experienced in complying with the rule.[86] In *Gutierrez*, the burden was necessarily heavy, regardless of ease of compliance, because an English-only rule constituted an impingement on personal identity.[87] *Spun Steak* avoided this argument altogether by noting that the prerogative

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[78] *Spun Steak*, 998 F.2d at 1489, 62 Fair Empl. Prac. Cas. (BNA) at 533.

[79] *Id.*

[80] *Id.* at 1489–90, 62 Fair Empl. Prac. Cas. (BNA) at 533.

[81] *Id.* at 1490, 62 Fair Empl. Prac. Cas. (BNA) at 533.

[82] *Id.*

[83] *Spun Steak*, 998 F.2d at 1490, 62 Fair Empl. Prac. Cas. (BNA) at 534 (Boochever, J., dissenting).

[84] *Id.* (Boochever, J., dissenting).

[85] *Id.* at 1490, 1491, 62 Fair Empl. Prac. Cas. (BNA) at 534 (Boochever, J., dissenting). Apparently Judge Boochever thought this should be an exception to the majority's position that, in a disparate impact case, the discriminatory harm must be proved, not merely inferred. *See supra* notes 81–82 and accompanying text.

[86] *See Gloor*, 618 F.2d at 270, 22 Fair Empl. Prac. Cas. (BNA) at 1407.

[87] *See Gutierrez*, 838 F.2d at 1039–40, 51 Fair Empl. Prac. Cas. (BNA) at 439–40.

to speak at work is an employer-granted privilege.[88] The *Spun Steak* majority, therefore, characterized the English-only rule not as imposing a burden but as limiting a privilege.[89] The majority emphasized that Title VII only protects against employment practices which have a significant adverse impact, and that, as applied to bilingual employees, an English-only rule is merely an inconvenience not rising to the level of significant adverse impact.[90] Under *Spun Steak*, only a rule resulting in a complete withdrawal of a privilege constitutes a significant adverse impact.[91] Thus, according to *Spun Steak*, mere impairment of the privileges of a national origin group is not a violation of Title VII.[92]

Although the *Spun Steak* court cited *Gloor* approvingly,[93] and although it came to the same conclusion, it did not use the same reasoning. In *Gloor*, an English-only rule applied to bilingual speakers did not constitute national origin discrimination because compliance did not involve a significant burden.[94] In *Spun Steak*, on the other hand, an English-only rule did not constitute national origin discrimination as applied to bilingual speakers because it did not signal a discriminatory denial of the employer-granted privilege to converse on the job.[95] Nevertheless, *Spun Steak* agreed with *Gloor* that employers can impose English-only rules on bilingual employees without any need to justify them by business necessity.[96] After *Spun Steak*, employees fighting such rules under Title VII will inevitably fail unless they can prove that their proficiency in English is so limited that such rules effectively deny them the privilege of conversing on the job.[97] Given the fact that such monolingual employees may be unlikely to bring suit at all, *Spun Steak* may have the practical effect of freeing employers to impose English-only rules with impunity. Moreover, although the English-only rule in *Spun Steak* was applied only "at certain times," nothing impedes extending its reasoning to rules applied "at all times."[98] If the prerogative

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[88] *Spun Steak*, 998 F.2d at 1487, 62 Fair Empl. Prac. Cas. (BNA) at 531.

[89] *See id.*

[90] *Id.* at 1488, 62 Fair Empl. Prac. Cas. (BNA) at 531.

[91] *See id.* at 1488, 62 Fair Empl. Prac. Cas. (BNA) at 532.

[92] *See id.*

[93] *Spun Steak*, 998 F.2d at 1489, 62 Fair Empl. Prac. Cas. (BNA) at 533.

[94] *See Gloor*, 618 F.2d at 270, 22 Fair Empl. Prac. Cas. (BNA) at 1407.

[95] *Spun Steak*, 998 F.2d at 1488, 62 Fair Empl. Prac. Cas. (BNA) at 532.

[96] *Id.* at 1490, 62 Fair Empl. Prac. Cas. (BNA) at 533; *Gutierrez*, 861 F.2d at 1190, 51 Fair Empl. Prac. Cas. (BNA) at 454 (denial of application for rehearing en banc) (Kozinski, J., dissenting).

[97] *See Spun Steak*, 998 F.2d at 1488, 62 Fair Empl. Prac. Cas. (BNA) at 532.

[98] In *Spun Steak*, the English-only rule applied during work hours but not during break times. 998 F.2d at 1483, 62 Fair Empl. Prac. Cas. (BNA) at 528. The Guidelines distinguish between rules applied only at certain times and those applied at all times, and require a higher level of scrutiny as to the latter. 29 C.F.R. § 1606.7 (1992). See *supra* note 3 for relevant text of the Guidelines.

to speak at work is not a right but a privilege, the employer should be free to define its contours during break times as during working hours.

In sum, the United States Court of Appeals for the Ninth Circuit, in *Garcia v. Spun Steak Co.*, held that an English-only rule, as applied to bilingual employees, does not constitute national origin discrimination under Title VII.[99] The court thus clarified the Ninth Circuit's view of English-only rules, which had been muddied in the wake of *Jurado* and *Gutierrez*.[100] The court explicitly rejected the Guidelines which held that such rules were a burdensome term and condition of employment even as applied to bilingual speakers.[101] After *Spun Steak*, an English-only rule is a violation of Title VII only with respect to those employees whose command of English is so limited that an English-only rule effectively denies them the privilege of conversing on the job.[102]

B. **Minority-owned Company's Word-of-mouth Recruiting not Disparate Treatment in Violation of Title VII:* EEOC v. Consolidated Service Systems[1]

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination on the basis of an individual's race, color, religion, sex or national origin.[2] By enacting Title VII, Congress in-

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[99] 998 F.2d at 1490, 62 Fair Empl. Prac. Cas. (BNA) at 533.

[100] Although *Gloor* and the Guidelines are facially contradictory, the *Jurado* court cited both approvingly. 813 F.2d at 1411, 43 Fair Empl. Prac. Cas. (BNA) at 873–74. *Gloor* was cited for the proposition that an English-only rule does not constitute disparate treatment if it is business related. *Id.* In fact, the *Gloor* court never reached the issue of business necessity because it held that an English-only rule is not prima facie discriminatory. *Gutierrez*, 861 F.2d at 1190, 51 Fair Empl. Prac. Cas. (BNA) at 454 (denial of application for rehearing en banc) (Kozinski, J., dissenting). The Guidelines, on the otherhand, were cited in the section of the *Jurado* opinion discussing disparate treatment but not in the section discussing disparate impact. *Id.* at 1190 n.3, 51 Fair Empl. Prac. Cas. (BNA) at 458 n.3 (Kozinski, J., dissenting). Such an interpretation contradicts the EEOC's intent. Equal Employment Opportunity Comm'n, 2 Compliance Manual § 623.6 (1984). Moreover, construing the Guidelines as referring to disparate treatment claims but not disparate impact claims is illogical. If the burden of an English-only rule is sufficient to raise an inference of discriminatory intent, it must a-fortiori be sufficient to raise an inference of discriminatory impact. These inconsistencies may be partially responsible for variant interpretations of *Jurado*. *Compare Gutierrez*, 838 F.2d at 1041 n.13, 51 Fair Empl. Prac. Cas. (BNA) at 441 n.13 ("Significantly, at the same place in *Jurado* that we cited [*Gloor*] we cited with approval the EEOC English-only guidelines, and specifically mentioned the business necessity requirement.") *with Gutierrez*, 861 F.2d at 1190 & n.3, 51 Fair Empl. Prac. Cas. (BNA) at 454 & n.3 (denial of application for rehearing en banc) (Kozinski, J., dissenting) ("In hamhanded fashion, the *Gutierrez* panel throws *Jurado's* rationale out the window and substitutes its own.").

[101] *Spun Steak*, 998 F.2d at 1489, 62 Fair Empl. Prac. Cas. (BNA) at 533.

[102] *Id.* at 1488, 62 Fair Empl. Prac. Cas. (BNA) at 532.

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[1] EEOC v. Consolidated Serv. Sys., 989 F.2d 233, 61 Fair Empl. Prac. Cas. (BNA) 327 (7th Cir. 1993).

[2] 42 U.S.C. § 2000e *et seq.* (1988). Section 2000e provides in relevant part:

tended to prohibit disparate treatment which occurs when an employer treats some employees or applicants for employment less favorably than others because of their race, color, religion, sex or national origin.[3] An employer must be shown to have a discriminatory motive for a claim of disparate treatment.[4] In some situations motive can be inferred simply from differences in treatment and unequal representation in the work force.[5] Congress, however, recognized that racial imbalances in the work force could come from legitimate, nondiscriminatory factors.[6] Thus, Title VII does not require an employer to engage in hiring quotas and allows employers to rely on nondiscriminatory, objective hiring standards.[7]

In 1975, the Court of Appeals for the Fourth Circuit, in *Barnett v. W.T. Grant Co.*, held that word-of-mouth hiring constituted disparate treatment under Title VII because it tended to perpetuate the all-white composition of a work force.[8] The employer primarily used word-of-mouth hiring to find drivers, but used advertising and open recruiting in its warehouse operations.[9] The plaintiff represented potential black driver applicants who were unaware of driving positions or discouraged

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(a) It shall be an unlawful employment practice for an employer:
(1) to fail or refuse to hire . . . any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

[3] International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15, 14 Fair Empl. Prac. Cas. (BNA) 1514, 1519 n.15 (1977).

[4] *Id.*

[5] *Id.*

[6] EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292, 297, 57 Fair Empl. Prac. Cas. (BNA) 408, 411 (7th Cir. 1991).

[7] *Id.* at 296–97, 57 Fair Empl. Prac. Cas. (BNA) at 411. The *Chicago Miniature* court cited relevant portions of 42 U.S.C. § 2000e-2 which provide:

(j) Nothing contained in this subchapter shall be interpreted to require any employer . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community. . . .

Id.

[8] 518 F.2d 543, 549, 10 Fair Empl. Prac. Cas. (BNA) 1057, 1062 (4th Cir. 1975).

[9] *See id.*

from applying because of the employer's hiring practices.[10] The racial composition of its warehouse operations were mixed, but all of the employer's drivers were white.[11] The court stated that the statistics were suggestive of discrimination because blacks were all in one work category.[12] The court contrasted the use of word-of-mouth recruiting of drivers which led to an all-white driving force with the open recruiting for other positions which led to a racially mixed force.[13] The court found that the difference in hiring practices was discriminatory.[14] Thus, the court held that word-of-mouth hiring was discriminatory as it tended to perpetuate an all-white composition of the work force.[15]

In 1980, the Court of Appeals for the Second Circuit held, in *Grant v. Bethlehem Steel Corp.*,that word-of-mouth hiring gave rise to a claim for disparate treatment in violation of Title VII.[16] The three appellants, two blacks and one "dark-skinned Puerto Rican," had extensive ironworker experience, repeatedly requested to be foremen, but were never appointed to the job by the defendant employer.[17] The construction industry in the defendant's geographic area had a long history of discrimination against blacks prior to the enactment of Title VII.[18] The construction company's foreman jobs were not posted, but only known through word-of-mouth and selection was on the basis of subjective criteria.[19] Ten percent of the ironworkers were black, but only one of the 126 foremen was black.[20] The court reasoned that word-of-mouth hiring could only be upheld when it was necessary to insure the safest and most competent workers.[21] Thus, the court held that solicitation of whites for the job of foreman through word-of-mouth hiring and failure to solicit qualified blacks, combined with the history of discrimination in the area, was a strong prima facie case of disparate treatment.[22]

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[10] *Id.* at 547, 10 Fair Empl. Prac. Cas. (BNA) at 1060.

[11] *Id.* at 549, 10 Fair Empl. Prac. Cas. (BNA) at 1061.

[12] *Id.*

[13] *Barnett*, 518 F.2d at 549, 10 Fair Empl. Prac. Cas. (BNA) at 1062.

[14] *Id.*

[15] *Id.* at 549–50, 10 Fair Empl. Prac. Cas. (BNA) at 1062.

[16] 635 F.2d 1007, 1017, 24 Fair Empl. Prac. Cas. (BNA) 798, 806 (2d Cir. 1980).

[17] *Id.* at 1010–11, 24 Fair Empl. Prac. Cas. (BNA) at 800–01.

[18] *Id.* at 1010, 24 Fair Empl. Prac. Cas. (BNA) at 800.

[19] *Id.* at 1011, 24 Fair Empl. Prac. Cas. (BNA) at 800.

[20] *Id.* at 1010, 24 Fair Empl. Prac. Cas. (BNA) at 800.

[21] *Grant*, 635 F.2d at 1016, 24 Fair Empl. Prac. Cas. (BNA) at 805.

[22] *Id.* at 1017, 24 Fair Empl. Prac. Cas. (BNA) at 806. Word-of-mouth hiring by a predominantly white or predominantly male work force has been disfavored where a statistically significant disparity between the make-up of either the applicant pool or the group hired, and that of the relevant labor market exists. BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 571 (American Bar Association 1983).

In 1991, in *EEOC v. Chicago Miniature Lamp Works*, the Court of Appeals for the Seventh Circuit held that word-of-mouth recruiting and hiring did not give rise to a claim of intentional discrimination without sufficiently disparate statistical representation of blacks in the work place as compared to the relevant labor market.[23] Chicago Miniature successfully used word-of-mouth recruitment to fill its entry level job openings.[24] Chicago Miniature never advertised for its entry-level jobs and only rarely used the State of Illinois unemployment referral service.[25] Chicago Miniature used newspaper advertisements to attract clerical and secretarial applicants.[26] The court reasoned that the employer made an intentional decision to employ word-of-mouth hiring.[27] Nonetheless, the court held that the intentional use of word-of-mouth hiring without statistical disparity was not enough to give rise to a claim of disparate treatment.[28]

The Seventh Circuit stated, however, in dictum, that it is not impossible to infer intentional discrimination from word-of-mouth recruitment.[29] The court observed that word-of-mouth hiring is given minimal weight in disparate treatment claims because it involves no affirmative act by the employer.[30] The court reasoned that inferring intent from non-action is more difficult than inferring intent from particular actions.[31] Thus, the court held that word-of-mouth hiring alone did not lead to a claim of disparate treatment.[32]

During the *Survey* year, in *EEOC v. Consolidated Service Systems*, the Court of Appeals for the Seventh Circuit held that a minority-owned business' reliance on word-of-mouth recruiting did not compel an inference of intentional discrimination and did not violate Title VII.[33]

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[23] *See* EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292, 301–04, 57 Fair Empl. Prac. Cas. (BNA) 408, 415–17 (7th Cir. 1991). The court held that the plaintiff had not stated a prima facie case of disparate treatment because the statistics relied on by the district court were not correctly gathered. *Id.* The court then analyzed whether other factors such as word-of-mouth hiring could create a claim of disparate treatment and held that without enough statistical disparity, word-of-mouth hiring alone did not create a claim of disparate treatment. *Id.*

[24] *Id.* at 295, 57 Fair Empl. Prac. Cas. (BNA) at 409.

[25] *Id.*

[26] *Id.* at 298, 57 Fair Empl. Prac. Cas. (BNA) at 412.

[27] *Id.*

[28] *See Chicago Miniature*, 947 F.2d at 304, 57 Fair Empl. Prac. Cas. (BNA) at 417.

[29] *Id.* at 298, 57 Fair Empl. Prac. Cas. (BNA) at 412.

[30] *Id.* at 298–99, 57 Fair Empl. Prac. Cas. (BNA) at 412.

[31] *Id.* at 299, 57 Fair Empl. Prac. Cas. (BNA) at 412.

[32] *Id.* at 304, 57 Fair Empl. Prac. Cas. (BNA) at 417.

[33] *See* 989 F.2d 233, 235, 61 Fair Empl. Prac. Cas. (BNA) 327, 329 (7th Cir. 1993). The court also held that the defendant was not entitled to attorney's fees because the EEOC's suit was not frivolous due to the statistical disparity between the racial composition of the labor market and Consolidated's work force. *Id.* at 234, 61 Fair Empl. Prac. Cas. (BNA) at 328; *see also* 42 U.S.C.

The court reasoned that word-of-mouth hiring was adopted as the cheapest and most efficient method of hiring employees.[34] The Seventh Circuit, therefore, did not find the requisite intent of disparate treatment.[35]

Consolidated, a small janitorial service, was owned by a person of Korean origin.[36] The company primarily used word-of-mouth hiring for the workers it employed.[37] It placed one advertisement in a Korean language paper which resulted in no hires.[38] Consolidated also placed two advertisements in the *Chicago Tribune* to recruit workers for a potential contract job.[39] It did not receive the contract for which it was seeking employees and therefore did not hire anyone.[40] As a result of Consolidated's primary reliance on word-of-mouth hiring, between 1983 and the first quarter of 1987, seventy-three percent of those who applied to Consolidated and eighty-one percent of the people hired were of Korean origin.[41] Less than one percent of the relevant area labor market was Korean, and no more than three percent of the janitorial and cleaning work force was Korean.[42]

The Equal Employment Opportunity Commission ("EEOC") brought suit against Consolidated in 1985 charging that the company discriminated in favor of persons of Korean origin in violation of Title VII.[43] After a bench trial, the district court judge dismissed the suit on the grounds that the EEOC failed to prove either disparate treatment or disparate impact under Title VII.[44] The EEOC appealed the denial of its claim of disparate treatment.[45]

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§ 2000e-5(k) (1988). The court noted that the defendant's burden would have been lighter under the Equal Access to Justice Act which requires only that a suit be groundless, not frivolous. *Consolidated*, 989 F.2d at 235, 61 Fair Empl. Prac. Cas. (BNA) at 328; *see also* 28 U.S.C. § 2412(d).

[34] *Consolidated*, 989 F.2d at 236, 61 Fair Empl. Prac. Cas. (BNA) at 330.

[35] *Id.*, 61 Fair Empl. Prac. Cas. (BNA) at 329.

[36] *Id.* at 234, 61 Fair Empl. Prac. Cas. (BNA) at 328.

[37] *Id.* at 235, 61 Fair Empl. Prac. Cas. (BNA) at 329.

[38] *Id.*

[39] *Consolidated*, 989 F.2d at 235, 61 Fair Empl. Prac. Cas. (BNA) at 329.

[40] *Id.* at 237, 61 Fair Empl. Prac. Cas. (BNA) at 330.

[41] *Id.* at 235, 61 Fair Empl. Prac. Cas. (BNA) at 329.

[42] *Id.*

[43] *Id.*

[44] *Consolidated*, 989 F.2d at 234, 61 Fair Empl. Prac. Cas. (BNA) at 328.

[45] *See id.* at 236, 61 Fair Empl. Prac. Cas. (BNA) at 330. The EEOC did not appeal the denial of its disparate impact claim. *Id.* The Seventh Circuit held in *Chicago Miniature* that word-of-mouth recruitment was not an employment practice and therefore was not subject to review for disparate impact. 947 F.2d 292, 305, 57 Fair Empl. Prac. Cas. (BNA) 408, 418 (7th Cir. 1991). Because *Chicago Miniature* was decided while *Consolidated* was pending appeal the EEOC abandoned its claim. *See Consolidated*, 989 F.2d at 236, 61 Fair Empl. Prac. Cas. (BNA) at 330.

The Seventh Circuit, in a unanimous decision, affirmed the judgment of the district court.[46] The *Consolidated* court did not find the necessary intent for a disparate treatment claim from Consolidated's use of word-of-mouth hiring alone or in combination with other factors.[47] The court reasoned that there were legitimate, nondiscriminatory reasons for Consolidated's use of word-of-mouth hiring.[48]

The court reasoned that word-of-mouth hiring was inexpensive and effective for Consolidated.[49] The court pointed to the fact that Consolidated used word-of-mouth hiring because it was a small company and it was the cheapest method of recruitment.[50] In addition, the court noted that word-of-mouth hiring was effective because Consolidated found all the competent workers it wanted and was able to pay them what it wanted.[51] The Seventh Circuit also reasoned that the passive stance of recruitment may have provided better employees.[52] The court stated that because current employees would not want to get in trouble with their employer they would have an incentive to refer good people for job openings.[53] Furthermore, the court reasoned that word-of-mouth hiring provided potential employees with an accurate job description leading to a higher probability of a good match.[54]

The court stated, however, that Consolidated was not exempt from Title VII because it was a small company.[55] Further, it held efficiency was not a defense to intentional discrimination.[56] Efficiency was only relevant, according to the court, because it was the reason *why* the method, word-of-mouth hiring, was adopted.[57]

The court stated that other employment methods Consolidated could have used for free did not undermine its use of word-of-mouth hiring because it was unaware of them.[58] Consolidated did not know about the Illinois Job Service and did not use it for that reason.[59] Thus,

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[46] *See Consolidated*, 989 F.2d at 238, 61 Fair Empl. Prac. Cas. (BNA) at 331.

[47] *See id.* at 236–37, 61 Fair Empl. Prac. Cas. (BNA) at 329–31.

[48] *See id.* at 235, 61 Fair Empl. Prac. Cas. (BNA) at 329.

[49] *Id.* at 235–36, 61 Fair Empl. Prac. Cas. (BNA) at 329.

[50] *Id.* at 235, 61 Fair Empl. Prac. Cas. (BNA) at 329.

[51] *Consolidated*, 989 F.2d at 235, 61 Fair Empl. Prac. Cas. (BNA) at 329.

[52] *Id.* at 236, 61 Fair Empl. Prac. Cas. (BNA) at 330.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 235, 61 Fair Empl. Prac. Cas. (BNA) at 329.

[56] *See Consolidated*, 989 F.2d at 236, 61 Fair Empl. Prac. Cas. (BNA) at 329.

[57] *See id.*; *see also* 42 U.S.C. § 2000e-2(k)(2) (1991). Section 2000e-2(k)(2) provides: "[a] demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title." 42 U.S.C. § 2000e-2(k)(2) (1991).

[58] *See Consolidated*, 989 F.2d at 235, 61 Fair Empl. Prac. Cas. (BNA) at 329.

[59] *Id.*

the court refused to infer intent to discriminate from its failure to use that service.[60]

The court concluded that even when Consolidated did use an alternative method of hiring its word-of-mouth hiring was not discredited.[61] The court noted that the newspaper advertisements Consolidated placed ran for a short period of time and resulted in no hires.[62] The court reasoned, therefore, that this result reinforced Consolidated's passive use of word-of-mouth hiring.[63]

The court held that the statistical disparity between the rate of non-hires for Koreans, versus non-Koreans, was not evidence of intentional discrimination.[64] The court noted that the EEOC could not find any non-Koreans who were truly interested in the advertised job.[65] In addition, the court noted that Consolidated did not hire *any* individuals who responded to the advertisement.[66] The court reasoned, therefore, that Consolidated did not engage in discriminatory hiring because it was not, in fact, hiring at all.[67]

The court also reasoned that it was difficult to infer intent, because of the passive nature of word-of-mouth hiring.[68] The court stated that only if an employer acts on an aversion or preference for members of its own ethnic/immigrant community will there be intentional discrimination.[69] As Consolidated took no significant action and there was no direct evidence of a preference or aversion, the court concluded that there was no intentional discrimination.[70] The court thus attributed the outcome of statistical disparity to the make-up of Consolidated's employee community.[71]

Finally, the Seventh Circuit stated that knowledge of a disparity is not the same thing as intending to cause or maintain it.[72] The court

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[60] *See id.*

[61] *See id.*

[62] *Id.*

[63] *Consolidated*, 989 F.2d at 235, 61 Fair Empl. Prac. Cas. (BNA) at 329.

[64] *See id.* at 236–37, 61 Fair Empl. Prac. Cas. (BNA) at 330.

[65] *Id.* at 237, 61 Fair Empl. Prac. Cas. (BNA) at 330. The court did not find any of the witnesses brought in by the EEOC credible. *Id.* In addition, although the EEOC claimed that 99 non-Koreans were unable to secure employment with Consolidated, only four witnesses were actually presented. *Id.*

[66] *Id.*

[67] *Id.*

[68] *Consolidated*, 989 F.2d at 236, 61 Fair Empl. Prac. Cas. (BNA) at 329.

[69] *Id.*

[70] *Id.* at 235–36, 61 Fair Empl. Prac. Cas. (BNA) at 329.

[71] *Id.* at 235, 61 Fair Empl. Prac. Cas. (BNA) at 329.

[72] *Id.* at 236, 61 Fair Empl. Prac. Cas. (BNA) at 329 (citing American Nurses' Assoc. v. Illinois, 783 F.2d 716, 722, 40 Fair Empl. Prac. Cas. (BNA) 244, 249 (7th Cir. 1986); *Chicago Miniature*, 947 F.2d 292, 299, 57 Fair Empl. Prac. Cas. (BNA) 408, 412 (7th Cir. 1991) (it is not intentional

stated that a racially or ethnically uniform work force does not impose a duty on an employer to spend money on advertisements.[73] The court reasoned that it would be ironic if the EEOC forced immigrants, often the target of discrimination, to implement expensive hiring procedures.[74] The court stated that immigrant communities are close-knit and small businesses are often the first opportunity for success.[75] The court observed, therefore, that to put an additional burden on them would be counter-productive.[76] The court analogized to black-run businesses and stated that the potential economic burdens would threaten minority-owned businesses.[77]

The Seventh Circuit Court of Appeals' decision in *Consolidated*, that word-of-mouth hiring did not compel an inference of intentional discrimination, augments its previous holding in *Chicago Miniature* that word-of-mouth hiring did not bar an inference of intentional discrimination. Thus, after *Consolidated*, word-of-mouth hiring by itself will not be dispositive in cases of disparate treatment under Title VII in the Seventh Circuit. Two strains of analysis run through the *Consolidated* opinion.[78] First, the court emphasizes the economic justification for word-of-mouth hiring which could lead to the application of the opinion's deferential approach to employers in all contexts.[79] Second, the court references the intent of Title VII, to protect individuals vulnerable to discrimination, which would lead to a more limited application and a deferential approach to the use of word-of-mouth hiring only in the context of minority/immigrant communities.[80]

The *Consolidated* opinion could be applied in all word-of-mouth disparate treatment cases if the court's emphasis on efficiency is focused on by subsequent courts. The court emphasized the efficient, effective and common sense nature of word-of-mouth hiring.[81] The policy of Title VII is given minimal emphasis in comparison.[82] This

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discrimination to adopt method of hiring because it is efficient even if employer is satisfied with resultant racial, religious, ethnic, national-origin or gender composition)).

[73] *Consolidated*, 989 F.2d at 237, 61 Fair Empl. Prac. Cas. (BNA) at 330.

[74] *Id.* at 238, 61 Fair Empl. Prac. Cas. (BNA) at 331.

[75] *Id.* at 237–38, 61 Fair Empl. Prac. Cas. (BNA) at 331.

[76] *See id.* at 238, 61 Fair Empl. Prac. Cas. (BNA) at 331.

[77] *Id.*

[78] *See Consolidated*, 989 F.2d at 235–38, 61 Fair Empl. Prac. Cas. (BNA) at 329–31.

[79] *Id.* at 235–37, 61 Fair Empl. Prac. Cas. (BNA) at 329–30.

[80] *Id.* at 237–38, 61 Fair Empl. Prac. Cas. (BNA) at 331.

[81] *Id.* at 235–37, 61 Fair Empl. Prac. Cas. (BNA) at 329–30.

[82] *See id.* at 237–38, 61 Fair Empl. Prac. Cas. (BNA) at 331. The discussion of the intent of Title VII is at the very end of the opinion. *Id.* In contrast, the court begins the opinion with the economic justifications for word-of-mouth hiring. *Id.* at 235–37, 61 Fair Empl. Prac. Cas. (BNA) at 329–30.

structure suggests that the Seventh Circuit will be deferential to employers in cases of word-of-mouth hiring. The deferential approach of the court is further suggested when the court accepted Consolidated's alternative reasons for the use of word-of-mouth hiring, refused to infer intent from the employer's failure to use other inexpensive hiring methods and posited rationales for the use of word-of-mouth hiring.[83]

A broad application of the *Consolidated* opinion would create problems for minority plaintiffs attempting to establish a prima facie case of disparate treatment where word-of-mouth hiring exists. Such an application would place the burden on plaintiffs to find more active employment practices instead of placing the burden on the employer to justify its practices. A subsequent interpretation based on the efficiency arguments, therefore, would effectively hurt the minority plaintiffs that the *Consolidated* court was attempting to protect and would be in direct conflict with the intent of Title VII.

The holding in *Consolidated* should be limited to situations in which minority or immigrant-owned businesses engage in word-of-mouth hiring to the detriment of majority groups. A limited application of *Consolidated* is consistent with both *Grant* and *Barnett* where word-of-mouth hiring was scrutinized and held to be evidence of intentional discrimination when it resulted in a racial imbalance in the work force, but only because additional factors showing intentional discrimination were present. In *Barnett*, not only was the employer using word-of-mouth hiring, but it used a different method of hiring in a separate part of its business and achieved a racially mixed work force.[84] Similarly, the employer in *Grant* engaged in word-of-mouth hiring, but, in addition, the construction industry in the defendant's geographic area had a long history of discrimination against blacks.[85] In *Consolidated* the court considered irrelevant the company's use of a Korean language paper for advertising because the advertisement failed to produce any hires.[86] In *Consolidated*, therefore, there were no other factors that indicated discriminatory intent.[87]

In addition, the *Consolidated* opinion emphasized that Consolidated was an immigrant-owned business.[88] The court noted that the intent of Title VII is to protect immigrant and minority communities.[89]

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[83] *See Consolidated*, 989 F.2d at 235–37, 61 Fair Empl. Prac. Cas. (BNA) at 329–30.
[84] 518 F.2d at 549, 10 Fair Empl. Prac. Cas. (BNA) at 1062.
[85] 635 F.2d at 1010, 24 Fair Empl. Prac. Cas. (BNA) at 800.
[86] 989 F.2d at 235, 61 Fair Empl. Prac. Cas. (BNA) at 329.
[87] *See id.*
[88] *Id.* at 238, 61 Fair Empl. Prac. Cas. (BNA) at 331.
[89] *See id.*

To apply the holding to majority-owned businesses, however, would hurt minorities and immigrants in contradiction of Title VII. The ramifications of a limited application of the *Consolidated* holding would be that discrimination would only be hard to prove when a minority or immigrant-owned business used a passive approach like word-of-mouth hiring to the detriment of a majority group.

In sum, the Court of Appeals for the Seventh Circuit, in *EEOC v. Consolidated Service Systems*, held that a minority-owned business' use of word-of-mouth hiring did not compel an inference of intentional discrimination under Title VII.[90] The result reached in *Consolidated* does not contradict the intent of Title VII and previous decisions if its reasoning is held to the context of minority or immigrant owned businesses. If the court's deferential approach to an employer's economically driven decision to use word-of-mouth hiring is taken out of the context of a small, minority-owned business, however, a significant burden of proof will be placed on minority plaintiffs when faced with discrimination due to word-of-mouth hiring. This result would be in direct contradiction to the intent of Title VII.

V. AGE DISCRIMINATION

A. **ADEA Protection Does Not Extend to Employees Fired to Avoid Payment of Full Pension Benefits:* Hazen Paper Co. v. Biggins[1]

The Age Discrimination in Employment Act of 1967 (hereinafter "ADEA") makes it illegal for an employer to discriminate against any employee or potential employee on the basis of age.[2] The law aims "to promote employment of older persons based on their ability rather than age [and] to prohibit arbitrary age discrimination in employment . . . ."[3] More specifically, the ADEA strives to protect those Americans who are age forty or older from age discrimination.[4]

Recently, the United States Circuit Courts have differed over the issue of whether frustration of certain employee benefits, like pension

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[90] *See id.* at 235, 61 Fair Empl. Prac. Cas. (BNA) at 329.

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[1] 113 S. Ct. 1701, 61 Fair Empl. Prac. Cas. (BNA) 793 (1993) [hereinafter *Hazen Paper Co.*].

[2] 29 U.S.C. § 623(a)(1) (1988). The pertinent language of § 623(a)(1) states: "It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *Id.*

[3] 29 U.S.C. § 621(b) (1988).

[4] *See* 29 U.S.C. § 631(a) (1988). The pertinent language of § 631(a) states: "The prohibitions in this chapter . . . shall be limited to individuals who are at least 40 years of age." *Id.*

plans, can lead to employer liability under the ADEA.[5] The First, Third, and Seventh Circuits have determined that such benefits are so inextricably intertwined with age that employment decisions based upon them constitute age discrimination under the ADEA.[6] In contrast, the Fourth and Fifth Circuits have held that interference with these types of benefits are analytically distinct from age discrimination and employers who discriminate on the basis of these benefits should not be held liable under the ADEA.[7]

In 1988, in *White v. Westinghouse Electric Co.*, the United States Court of Appeals for the Third Circuit held that the firing of a 51-year-old employee just prior to the complete vestiture of his pension benefits could violate the ADEA if that law is analyzed using the the disparate treatment theory.[8] Westinghouse terminated White three months before his pension fully vested.[9] The company did not replace him.[10] The court reasoned that such pension benefits were "inextricably linked" to an employee's years of service and are thus linked to his or her age.[11] The court also emphasized that there is a close practical link between pension benefits, seniority, and age.[12] Thus, the court held that employment decisions based upon the status of a worker's pension plan could constitute age discrimination.[13]

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[5] *Compare* White v. Westinghouse Elec. Co., 862 F.2d 56, 62, 48 Fair Empl. Prac. Cas. (BNA) 597, 601 (3rd Cir. 1988) (older employee fired to prevent pension benefits from vesting stated cause of action under the ADEA) *and* Metz v. Transit Mix, Inc., 828 F.2d 1202, 1206, 44 Fair Empl. Prac. Cas. (BNA) 1339, 1342 (7th Cir. 1987) (older employee fired because of higher, seniority-based pay stated cause of action under the ADEA) *with* EEOC v. Clay Printing Co., 955 F.2d 936, 942, 58 Fair Empl. Prac. Cas. (BNA) 256, 262 (4th Cir. 1992) (older employees fired because of seniority and higher pay do not state a cause of action under the ADEA) *and* Williams v. General Motors Corp., 656 F.2d 120, 130 n.17, 26 Fair Empl. Prac. Cas. (BNA) 1381, 1388–89 n.17 (5th Cir. 1981) (older employees fired because of seniority status do not state a cause of action under the ADEA), *cert. denied*, 455 U.S. 943 (1982).

[6] *See* Biggins v. Hazen Paper Co., 953 F.2d 1405, 1412, 57 Fair Empl. Prac. Cas. (BNA) 1160, 1162 (1st Cir. 1992) [hereinafter *Biggins*]; *White*, 862 F.2d at 62, 48 Fair Empl. Prac. Cas. (BNA) at 601; *Metz*, 828 F.2d at 1206, 44 Fair Empl. Prac. Cas. (BNA) at 1342.

[7] *See Clay Printing*, 955 F.2d at 943, 58 Fair Empl. Prac. Cas. (BNA) at 263; *Williams*, 656 F.2d at 130 n.17, 26 Fair Empl. Prac. Cas. (BNA) at 1388 n.17.

[8] *White*, 862 F.2d at 62, 48 Fair Empl. Prac. Cas. (BNA) at 601. The Court of Appeals overruled the district court's summary judgment in favor of the defendant and remanded the case for further proceedings to determine whether White had been subjected to age discrimination. *Id.* For a discussion of the United States Supreme Court's interpretation of the use of the disparate treatment and disparate impact theories under the ADEA, see *infra* note 54.

[9] *White*, 862 F.2d at 58–59, 48 Fair Empl. Prac. Cas. (BNA) at 598.

[10] *Id.* at 58, 48 Fair Empl. Prac. Cas. (BNA) at 598.

[11] *Id.* at 62, 48 Fair Empl. Prac. Cas. (BNA) at 601. The vestiture of White's pension was based solely on his years of service with the company and not the attainment of a certain age. *See id.* at 58–59, 48 Fair Empl. Prac. Cas. (BNA) at 598.

[12] *See id.* at 62, 48 Fair Empl. Prac. Cas. (BNA) at 601.

[13] *Id.*

Similarly, in 1987, in *Metz v. Transit Mix*, the United States Court of Appeals for the Seventh Circuit, interpreting the ADEA using the disparate treatment theory, held that an employer could not fire higher-paid, more senior employees even if it claimed the move was a cost-cutting measure.[14] Transit Mix fired the 54-year-old, highly-paid Metz and replaced him with a 43-year-old assistant manager for approximately half the salary Metz received.[15] Even though Metz and the assistant manager were both within the class protected by the ADEA, the Seventh Circuit reasoned that allowing such economic discrimination would undermine the policies behind the ADEA.[16] The court reasoned that employment decisions based upon such economic factors like savings in salary constituted age discrimination.[17]

The court rejected the defendant's argument that ADEA liability only applied when such economic factors affected older workers as a whole and not when the company evaluated such factors on an individual basis.[18] The court reasoned that this distinction was incorrect because the ADEA was intended to protect the individual employee, not a class of employees.[19] The court held, therefore, that employment actions based on economic factors such as salary increases based upon an employee's seniority within the company, even when carried out in individual cases, would amount to age discrimination.[20]

Conversely, in 1992, in *EEOC v. Clay Printing Co.*, the United States Court of Appeals for the Fourth Circuit held that the move by Clay Printing to remove more senior, higher-paid workers did not violate the ADEA, as understood under the disparate treatment theory, even though years of service played a part in the decision-making process.[21] In *Clay*, the company fired five long-time employees, all of whom were over forty and, therefore, within the protected class.[22] The court reasoned that no connection exists between the age and length of service of an employee.[23] The fact that an employee has served a company for

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[14] 828 F.2d at 1206, 44 Fair Empl. Prac. Cas. (BNA) at 1342.

[15] *Id.* at 1203–04, 44 Fair Empl. Prac. Cas. (BNA) at 1340.

[16] *Id.* at 1207, 44 Fair Empl. Prac. Cas. (BNA) at 1343.

[17] *Id.* at 1206, 44 Fair Empl. Prac. Cas. (BNA) at 1342. The court also cited a Second Circuit opinion which held that employment decisions based upon an employee's unpaid pension benefits would likewise constitute age discrimination. *Id.* at 1208, 44 Fair Empl. Prac. Cas. (BNA) at 1343 (citing Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715 (E.D.N.Y. 1978), *aff'd in part, rev'd and remanded in part without opinion*, 608 F.2d 1369 (2d Cir. 1979)).

[18] *See Metz*, 828 F.2d at 1206, 44 Fair Empl. Prac. Cas. (BNA) at 1342.

[19] *Id.*

[20] *Id.*

[21] 955 F.2d 936, 943, 58 Fair Empl. Prac. Cas. (BNA) 256, 263 (4th Cir. 1992).

[22] *Id.* at 938–39, 58 Fair Empl. Prac. Cas. (BNA) at 259.

[23] *Id.* at 942, 58 Fair Empl. Prac. Cas. (BNA) at 262.

many years, the court reasoned, does not necessarily mean that workers will have reached an age within the protected class.[24] Thus, the court concluded that pensions, and other benefits based upon years of service, are not connected to age for the purposes of interpreting the ADEA.[25]

Finally, in 1981, in *Williams v. General Motors Corp.*, the United States Court of Appeals for the Fifth Circuit held that seniority and age were unrelated for the purposes of ADEA claims as understood under the disparate treatment theory.[26] Fifteen employees of General Motors brought suit against the company after they were either terminated or demoted from salaried to hourly wage positions.[27] The court pointed out that the statute protects only persons who have reached an age within the protected class.[28] The court reasoned that persons within the protected class may, or may not, have reached the years of service required to receive benefits associated with seniority such as the vesting of a pension plan.[29]

Thus, the Fifth Circuit implied that the ADEA should not be extended to protect workers on the basis of arguably what are only "age-related" factors.[30] The court stated that the law requires only that employers not discriminate on the basis of age, but it does not force them to accord special treatment to members of the protected group.[31] The court, therefore, held that employers who discriminate based upon arguably "age-related" factors should not be held liable under the ADEA.[32]

During the *Survey* year, in *Hazen Paper Co. v. Biggins*, the United States Supreme Court resolved the split in the circuits by holding that an employer did not violate the ADEA when it fired a worker solely on the basis of factors other than age.[33] In so holding, the Court adopted

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[24] *Id.*

[25] *See id.* at 943, 58 Fair Empl. Prac. Cas. (BNA) at 263.

[26] 656 F.2d 120, 130 n.17, 26 Fair Empl. Prac. Cas. (BNA) 1381, 1388 n.17 (5th Cir. 1981). The Court of Appeals chided the district court for blurring the analytical distinction that the Court of Appeals held existed between age and seniority status. *Id.*

[27] *Id.* at 122, 26 Fair Empl. Prac. Cas. (BNA) at 1382.

[28] *Id.* at 130 n.17, 26 Fair Empl. Prac. Cas. (BNA) at 1388 n.17. The changes in the employees' positions occurred during widespread "personal adjustments" that the company instituted during a recession. *Id.* at 122, 26 Fair Empl. Prac. Cas. (BNA) at 1382.

[29] *Id.* at 130 n.17, 26 Fair Empl. Prac. Cas. (BNA) at 1388 n.17. The court set out a simple example illustrating the distinction: a 35-year-old worker, who falls outside the protected age group, could have more seniority than a protected 55-year-old worker. *Id.*

[30] *See id.*

[31] *Williams*, 656 F.2d at 129, 26 Fair Empl. Prac. Cas. (BNA) at 1388.

[32] *Id.* at 130 n.17, 26 Fair Empl. Prac. Cas. (BNA) at 1388 n.17.

[33] 113 S. Ct. 1701, 1705, 61 Fair Empl. Prac. Cas. (BNA) 793, 795 (1993).

the reasoning of the Fourth and Fifth Circuits that decisions to fire employees based upon factors such as pension benefits or seniority status are analytically distinct from age discrimination.[34] After *Hazen*, therefore, employers will not be liable under the ADEA merely for interfering with an older worker's pension benefits or factors other than age, unless a clear connection is made between such an interference and discrimination based upon the employee's age.[35]

The respondent in *Hazen*, Biggins, was the first technical director for the petitioner Hazen Paper Company (hereinafter "Hazen").[36] Biggins worked for Hazen for more than nine-and-a-half years.[37] His benefits package included a pension plan which would have provided him with $93,000 when it fully vested after ten years of service to the company.[38] Biggins became embroiled in a salary dispute with his employer and was discharged when he was 62-years-old.[39] He then filed suit in the United States District Court for the District of Massachusetts.[40] Biggins claimed that Hazen had violated the ADEA.[41]

The district court awarded Biggins damages under all of his claims against Hazen.[42] The United States Court of Appeals for the First Circuit upheld the district court's findings and held that, since the "age discrimination" was willful, Biggins was entitled to liquidated damages under the ADEA.[43] Even though his pension plan was based upon Biggins' years of service, the court noted that "but for" Biggins' age, his pension rights would not have been within a "hairbreadth of vesting."[44] The First Circuit, therefore, concluded that it was appropriate for the jury to decide whether age was inextricably linked to Biggins' termination and whether Hazen's action violated the ADEA.[45]

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[34] *See id.* at 1707, 61 Fair Empl. Prac. Cas. (BNA) at 796.

[35] *See id.*

[36] Biggins v. Hazen Paper Co., 953 F.2d 1405, 1410, 57 Fair Empl. Prac. Cas. (BNA) 1160, 1162 (1st Cir. 1992).

[37] *Id.*

[38] *Id.* at 1411, 57 Fair Empl. Prac. Cas. (BNA) at 1163.

[39] *Id.* at 1410, 1411, 57 Fair Empl. Prac. Cas. (BNA) at 1163, 1164.

[40] *Id.* at 1408, 57 Fair Empl. Prac. Cas. (BNA) at 1160–61.

[41] *Biggins*, 953 F.2d at 1408, 57 Fair Empl. Prac. Cas. (BNA) at 1161. Biggins also claimed that the company had violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1140 (1988), the Massachusetts Civil Rights Act, Mass. Gen. L. ch. 12 §§ 11(H)(I) (1986), and various state law claims. *Id.*

[42] *Id.* at 1408, 57 Fair Empl. Prac. Cas. (BNA) at 1161. The jury awarded Biggins $560,775 for the ADEA claim, $100,000 for the ERISA claim, $315,098 on a fraud claim, $266,897 for breach of contract and a token award of $1 for state civil rights violations. *Id.*

[43] *Id.* at 1416, 57 Fair Empl. Prac. Cas. (BNA) at 1167. The court slightly lowered the original amount awarded by the jury before liquidating the damages. *Id.* The final award for the ADEA claim was $838,908.76. *Id.*

[44] *Id.* at 1412, 57 Fair Empl. Prac. Cas. (BNA) at 1164.

[45] *Id.*

On grant of certiorari to resolve the ambiguity in the circuit courts, the United States Supreme Court vacated and remanded the First Circuit's decision.[46] The Court held that frustration of a worker's pension benefits and other employment decisions based wholly on factors other than age could not lead to ADEA liability for an employer.[47] A majority of the Court reasoned that ADEA protection could not be extended to Biggins if he was fired solely because he was close to vesting, and it therefore remanded the case to determine if there was sufficient evidence to show that Biggins' age was Hazen's primary motivation for firing him.[48]

Writing for the majority, Justice O'Connor stated that the primary evil the ADEA sought to eliminate was "inaccurate and stigmatizing stereotypes" about older workers.[49] Justice O'Connor implied that although Biggins' age placed him within the protected class, if pension interference, by itself, were considered actionable under the ADEA an employee outside the class could win on an ADEA claim.[50] Using reasoning similar to that used in *Williams v. General Motors Corp.*,[51] Justice O'Connor concluded that a person could have enough years of service to qualify for pension benefits and yet not have reached the minimum age of forty required for ADEA protection.[52] The majority, therefore, reasoned that age and years of service are analytically distinct.[53] The majority concluded that interference with Biggins' pension benefits, by itself, did not necessarily constitute impermissible age discrimination as interpreted under the ADEA using the disparate treatment theory.[54]

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[46] Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1710, 61 Fair Empl. Prac. Cas. (BNA) 793, 798 (1993).

[47] *Id.* at 1707, 61 Fair Empl. Prac. Cas. (BNA) at 796. The Court also clarified the meaning of "willful" under § 7(b) of the ADEA stating that a plaintiff only has to show that an employer either knew or showed reckless disregard over whether it violated that law to establish willfulness. *Id.* at 1710, 61 Fair Empl. Prac. Cas. (BNA) at 798.

[48] *Id.* at 1707, 1708, 61 Fair Empl. Prac. Cas. (BNA) at 796, 797.

[49] *Id.* at 1706, 61 Fair Empl. Prac. Cas. (BNA) at 795.

[50] *See id.* at 1707, 61 Fair Empl. Prac. Cas. (BNA) at 796.

[51] *See supra* note 29.

[52] *See Hazen Paper Co.*, 113 S. Ct. at 1707, 61 Fair Empl. Prac. Cas. (BNA) at 796.

[53] *Id.*

[54] *Id.* at 1705, 61 Fair Empl. Prac. Cas. (BNA) at 795. Justice O'Connor, writing for the majority, prefaced her opinion by clarifying the distinction between the disparate impact and disparate treatment theories utilized in analyzing cases of possible employment discrimination in Title VII sexual harassment claims. *See id.* at 1705–06, 61 Fair Empl. Prac. Cas. (BNA) at 795. Justice O'Connor stated that, under a disparate treatment claim, if an employer discriminated against a worker because of a certain trait, it would be imperative that the worker prove that the trait was the determinative factor behind the disparate treatment. *Id.* at 1705, 61 Fair Empl. Prac. Cas. (BNA) at 795. In contrast, Justice O'Connor noted that under a disparate impact claim, a worker need only show that a facially neutral employment practice fell more harshly on his or

The majority emphasized that its decision did not mean that an employer could *lawfully* fire a worker merely to avoid paying full pension benefits.[55] The majority limited its holding by stating that this case involved a claim of disparate *treatment* and not disparate *impact*.[56] The majority also noted the possibility that an employee in such a situation could seek relief on other grounds.[57]

Justice Kennedy, in a concurring opinion joined by Justice Thomas and Chief Justice Rehnquist, asserted that the majority's opinion should not be read to imply that the disparate impact theory will succeed in ADEA cases.[58] Justice Kennedy argued that the Court had not previously addressed this question and that there were substantial questions about the propriety of extending the disparate impact analysis from Title VII to ADEA cases.[59] Furthermore, the concurrence pointed out that the issue was not raised in this case, because Biggins only asserted a disparate treatment claim against Hazen.[60]

The majority did not foreclose the possibility that pension status could play a role in a successful ADEA claim.[61] For example, an employer who makes the logical link between age and pension or seniority status and then discriminates against older employees could be liable under the ADEA.[62] Likewise, an employee might successfully sue an employer under the ADEA if a company discriminates on the basis of age *and* pension status.[63] Finally, the majority implied that ADEA liability could arise in the event that a company fired an employee before his or her pension was about to vest as a result of reaching an age within the protected class.[64] In spite of these alternatives, the fact remains that unless the employee makes a clear connection between possibly "age-related" factors and age, the ADEA cannot be used to prevent discrimination based upon anything other than age.[65]

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her protected class and that the practice could not be justified by business necessity. *Id.* Justice O'Connor further observed that the disparate treatment theory could be used in ADEA cases, but that the Court had never decided whether the disparate impact theory could also be utilized. *Id.* at 1706, 61 Fair Empl. Prac. Cas. (BNA) at 795. The majority declined to examine the issue, because Biggins had only claimed disparate treatment. *Id.*

[55] *Id.* at 1707, 61 Fair Empl. Prac. Cas. (BNA) at 796.

[56] *Hazen Paper Co.*, 113 S. Ct. at 1706, 61 Fair Empl. Prac. Cas. (BNA) at 795.

[57] *See id.* at 1707, 61 Fair Empl. Prac. Cas. (BNA) at 796. For example, the Court did not disturb the ERISA and state law claim judgments that Biggins received. *See id.*

[58] *Id.* at 1710, 61 Fair Empl. Prac. Cas. (BNA) at 798–99.

[59] *Id.* at 1710, 61 Fair Empl. Prac. Cas. (BNA) at 799.

[60] *Id.* at 1710, 61 Fair Empl. Prac. Cas. (BNA) at 798.

[61] *Hazen Paper Co.*, 113 S. Ct. at 1707, 61 Fair Empl. Prac. Cas. (BNA) at 796.

[62] *See id.*

[63] *See id.*

[64] *See id.*

[65] *See id.*

The majority, while adopting the Fourth and Fifth Circuits' position that there is a distinction between age and pension or seniority status, declined to discuss whether disparate impact cases can be brought under the ADEA.[66] The *Metz* case, however, which was cited approvingly by the majority, discussed two precedents in which employers were held liable under the ADEA through the use of the disparate impact theory.[67] Since the *Hazen* majority declined to address this issue, employees within the protected class may still try to use the disparate impact theory as a potential avenue for holding employers liable under the ADEA if they discriminate on the basis of pending pension vestiture or other possibly "age-related" benefits.[68]

The *Hazen* majority also suggested, in dicta, other ways in which the interference with pension or seniority status or other possibly "age-related" benefits may be utilized to successfully sue an employer under the ADEA.[69] If a plaintiff demonstrates that the employer made the logical link between pension benefits and a worker's age and then fired that employee, the employer might be liable under the ADEA.[70] Similarly, if a plaintiff proves that a company took action based upon pension or other possibly "age-related" benefits *and* age, the company could be liable under the ADEA.[71] Lastly, in the unlikely event that a person's pension vested because he or she had reached an age within the protected class, then the employer could be held liable under the ADEA.[72]

In sum, the decision in *Hazen Paper Co. v. Biggins* definitively resolved that an employer's interference with a worker's pension benefits did not, by itself, constitute age discrimination under the ADEA as interpreted using the disparate impact theory.[73] Although employees will not succeed by merely proving that employment decisions were based upon pension or seniority status or the existence of other possibly "age-related" benefits, companies will not have an impenetrable defense if they claim to be making these decisions based upon such "economic factors."[74] As the *Hazen* majority implied, an

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[66] *See Hazen Paper Co.*, 113 S. Ct. at 1706, 61 Fair Empl. Prac. Cas. (BNA) at 795.

[67] *See* Metz v. Transit Mix, Inc., 828 F.2d 1202, 1207–08, 44 Fair Empl. Prac. Cas. (BNA) 1339, 1343 (7th Cir. 1987) (citing Leftwich v. Harris-Stowe State College, 702 F.2d 686, 691 (8th Cir. 1983) and Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981)).

[68] *See Hazen Paper Co.*, 113 S. Ct. at 1706, 61 Fair Empl. Prac. Cas. (BNA) at 795.

[69] *Id.* at 1707–08, 61 Fair Empl. Prac. Cas. (BNA) at 796–97.

[70] *See id.* at 1707, 61 Fair Empl. Prac. Cas. (BNA) at 796.

[71] *See id.* In fact, the Court remanded the case to the circuit court because there was some evidence that might lead to liability for Hazen under the ADEA as well as ERISA. *See id.*

[72] *See id.*

[73] *See* 113 S. Ct. at 1705, 61 Fair Empl. Prac. Cas. (BNA) at 795.

[74] *Id.* at 1707–08, 61 Fair Empl. Prac. Cas. (BNA) at 796–97.

employee will have the burden of proof to show the nexus between such factors and impermissible age discrimination.[75] An employee may also be successful if he or she can demonstrate that a purportedly neutral employment action involving pension or seniority status, or similar "economic factors," disparately impacts older workers.[76] In the final analysis, it appears that the majority in *Hazen* has only made it more difficult, but not impossible, for plaintiffs to gain ADEA protection when employers interfere with their pension, seniority or "age-related" benefits.[77]

VI. Religious Discrimination

A. **An Employer's Duty to Accommodate its Employees' Religious Beliefs Under Title VII:* Cook v. Chrysler Corporation[1]

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination on the basis of an individual's religion.[2] It was unclear when Congress passed Title VII, however, whether an employer was prevented from discharging an employee who, for religious reasons, refused to work during the employer's normal workweek.[3] This question was first addressed by the Equal Employment Opportunity Commission ("EEOC") in its 1966 Guidelines on Discrimination Because of Religion.[4] The EEOC initially required that an employer affirmatively accommodate the religious needs of employees short of *serious inconvenience* to the employer's business.[5] In 1967, the EEOC amended its guidelines to require employers to reasonably accommodate employees' religious needs short of *undue hardship* on the employer's business.[6] The purpose behind this duty to accommodate was

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[75] *See id.*

[76] *See id.*

[77] *See id.*

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[1] 981 F.2d 336, 60 Fair Empl. Prac. Cas. (BNA) 647 (8th Cir. 1992).

[2] Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1988). This provision states in part:

> It shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin . . . .

[3] *See* Trans World Airlines v. Hardison, 432 U.S. 63, 72, 14 Fair Empl. Prac. Cas. (BNA) 1697, 1700 (1977).

[4] Barbara L. Schlei & Paul Grossman, Employment Discrimination Law 210 (2d ed. 1983); 29 CFR § 1605.1(a)(2) (1966).

[5] 29 CFR § 1605.1(a)(2) (1967); *TWA*, 432 U.S. at 72, 14 Fair Empl. Prac. Cas. (BNA) at 1700.

[6] 29 CFR § 1605.1(b) (1968); *TWA*, 432 U.S. at 72, 14 Fair Empl. Prac. Cas. (BNA) at 1700–01.

to mitigate the impact of employer policies, neutral on their face, upon employees whose religious convictions prohibited them from working on the Sabbath or other religiously observed days.[7]

In 1970, the EEOC's amended Guidelines were challenged by the United States Court of Appeals for the Sixth Circuit in *Dewey v. Reynolds Metals Co.*[8] In *Dewey*, the plaintiff was discharged for refusing to work on Sundays in accordance with his religious beliefs.[9] The court, in holding for the employer, concluded that the requirement of accommodation to religious beliefs was contained only in the EEOC Guidelines and was without statutory basis.[10] In 1971, the United States Supreme Court affirmed the Sixth Circuit's decision by an equally divided court.[11] Accordingly, the Supreme Court's decision was not entitled to precedential weight, and the issues of "reasonable accommodation" and "undue hardship" were therefore left undefined.[12]

In 1972, Congress resolved the issue raised in *Dewey* by amending the Civil Rights Act of 1964.[13] A newly added provision, section 701(j), placed upon employers a statutory affirmative duty to "reasonably accommodate" employees' religious beliefs, still limited by the proviso that such accommodation need not go so far as to impose an undue hardship on the employer's business.[14] Section 701(j), however, did not provide any practical guidance for determining the degree of accommodation required by an employer or what constitutes an undue hardship.[15] Furthermore, the scant legislative history of section 701(j) offered little assistance in ascertaining the extent of the obligation created by the amendment.[16] Likewise, cases decided in the circuit

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[7] SCHLEI & GROSSMAN, *supra* note 4, at 210.

[8] *See* 429 F.2d 324, 327, 2 Fair Empl. Prac. Cas. (BNA) 687, 688 (original opinion), *reh'g denied*, 2 Fair Empl. Prac. Cas. (BNA) 869 (6th Cir. 1970), *aff'd mem. by an equally divided court*, 402 U.S. 689, 3 Fair Empl. Prac. Cas. (BNA) 508 (1971).

[9] *See id.* at 329, 2 Fair Empl. Prac. Cas. (BNA) at 869.

[10] *See id.* at 334, 2 Fair Empl. Prac. Cas. (BNA) at 870.

[11] 402 U.S. 689, 3 Fair Empl. Prac. Cas. (BNA) 508 (1971). The Court split 4–4, with Justice Harlan not taking part in the decision.

[12] *Id. See* 3 ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 92.11 (1993); *see also TWA*, 432 U.S. at 73 n.8, 14 Fair Empl. Prac. Cas. (BNA) at 1701 (judgment entered by an equally divided court is not "entitled to precedential weight"(quoting Neil v. Biggers, 409 U.S. 188, 192 (1972))).

[13] *See* SCHLEI & GROSSMAN, *supra* note 4, at 211. Section 701(j) states:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Civil Rights Act of 1964, § 701(j), 42 U.S.C. § 2000e(j) (1988).

[14] Civil Rights Act of 1964, § 701(j), 42 U.S.C. § 2000e(j) (1988).

[15] *See* Civil Rights Act of 1964, § 701(j), 42 U.S.C. § 2000e(j) (1988); *TWA*, 432 U.S. at 74, 14 Fair Empl. Prac. Cas. (BNA) at 1701.

[16] *See* 118 CONG. REC. 705 (1972). See *TWA*, 432 U.S. at 74–75, 14 Fair Empl. Prac. Cas.

courts since the passage of section 701(j) provided little guidance concerning the scope of an employer's duty to accommodate an employee's religious beliefs.[17]

In 1977, in *Trans World Airlines, Inc. v. Hardison*, the United States Supreme Court clarified the "reasonable accommodation" standard by holding that employers need not take accommodation steps which would require the employer to bear more than a *de minimis* financial cost.[18] In *TWA*, the plaintiff's religion required that he refrain from performing any work from sunset on Friday to sunset on Saturday.[19] The work shifts of all TWA employees were governed by a seniority provision in a collective bargaining agreement, whereby the most senior employees would have first choice for job and shift assignments as they became available.[20] A conflict arose when the plaintiff, because of his low seniority, was asked to work Saturdays.[21]

Upon being informed of the plaintiff's religious needs, TWA made an effort to find the plaintiff another job where the hours would not conflict with his religious observances.[22] When this failed, the plaintiff proposed either that his shift be exchanged with another worker or that he work only four days per week.[23] TWA informed the

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(BNA) at 1701–02; LARSON & LARSON, *supra* note 12, at § 92.11, 19–34; Sara L. Silbiger, Note, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since* Trans World Airlines v. Hardison, 53 FORDHAM L. REV. 839, 841–42 (1985). Senator Jennings Randolph, the proponent of the § 701(j), expressed his general desire "to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law," but made no attempt to define the circumstances under which the "reasonable accommodation" requirement would be applied or how it would be applied. *TWA*, 432 U.S. at 74–75, 14 Fair Empl. Prac. Cas. (BNA) at 1701–02.

[17] *See* Sally Brandes, Note, *Religious Discrimination in Employment—The Undoing of Title VII's Reasonable Accommodation Standard*, 44 BROOK. L. REV. 598, 600 n.12 (1978). The Fifth, Sixth, and Tenth Circuits have found the accommodation standard satisfied in cases where employers have refused to take steps that would permit an employee to observe the Sabbath at the expense of other employees. *See* Williams v. Southern Union Gas Co., 529 F.2d 483, 489, 12 Fair Empl. Prac. Cas. (BNA) 5, 9, *cert. denied*, 429 U.S. 959, 13 Fair Empl. Prac. Cas. (BNA) 1408 (10th Cir. 1976); Reid v. Memphis Publishing Co., 521 F.2d 512, 521, 11 Fair Empl. Prac. Cas. (BNA) 129, 136 (6th Cir. 1975), *reh'g denied*, 525 F.2d 986, 12 Fair Empl. Prac. Cas. (BNA) 608, *cert. denied*, 429 U.S. 964, 13 Fair Empl. Prac. Cas. (BNA) 1408 (1976); Johnson v. U.S. Postal Serv., 497 F.2d 128, 130, 8 Fair Empl. Prac. Cas. (BNA) 371, 372–73 (5th Cir. 1974). The Fifth and Sixth Circuits, however, have reached the opposite conclusion on similar fact patterns without attempting to justify the differing results. Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 522, 11 Fair Empl. Prac. Cas. (BNA) 1106, 1111 (6th Cir. 1975); Riley v. Bendix Corp., 464 F.2d 1113, 1118, 4 Fair Empl. Prac. Cas. (BNA) 951, 954 (5th Cir. 1972).

[18] *See* 432 U.S. at 84, 14 Fair Empl. Prac. Cas. (BNA) at 1705.

[19] *Id.* at 67, 14 Fair Empl. Prac. Cas. (BNA) at 1699.

[20] *Id.* at 67, 14 Fair Empl. Prac. Cas. (BNA) at 1698.

[21] *Id.* at 68, 14 Fair Empl. Prac. Cas. (BNA) at 1699.

[22] *Id.*

[23] *TWA*, 432 U.S. at 68–69, 14 Fair Empl. Prac. Cas. (BNA) at 1699.

plaintiff that they could not accommodate either of his proposals.[24] The plaintiff continued to miss work on Saturdays and was eventually discharged for unexcused absences.[25]

The Court, holding for the employer, interpreted section 701(j) to mean that employers need only make a good faith effort to accommodate an employee's religious beliefs and need not take accommodation steps which would require the employer to bear more than a *de minimis* financial cost.[26] The Court focused its opinion on the effect that accommodating the plaintiff's religious needs would have on the plaintiff's co-employees.[27] The Court concluded that, to accommodate the plaintiff, TWA would have to deprive other employees of their shift preferences because they did not adhere to a religion that observed the Saturday Sabbath.[28] After examining section 701(j) and its legislative history, the Court concluded that the emphasis of Title VII is on eliminating discrimination, and such discrimination is proscribed when it is directed against majorities as well as minorities.[29]

Furthermore, the Court determined that the collective bargaining agreement itself represented a significant accommodation to the needs, both secular and religious, of all of TWA's employees.[30] The Court reasoned that, although a collective bargaining agreement may not be employed to violate Title VII, the duty to accommodate does not require an employer to take steps inconsistent with an otherwise valid agreement.[31] Finally, the Court reasoned that to accommodate

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[24] *See id.* The plaintiff's proposal to have his shift exchanged with another employee was rejected because "the union was not willing to violate the seniority provisions set out in the collective bargaining contract . . . ." *Id.* at 68, 14 Fair Empl. Prac. Cas. (BNA) at 1699. The plaintiff's proposal that he only work four days a week was also rejected because:

> [His] job was essential, and on weekends he was the only available person on his shift to perform it. To leave the position empty would have impaired supply shop functions, which were critical to airline operations; to fill the plaintiff's position with a supervisor or employee from another area would simply have undermanned another operation; and to employ someone not regularly assigned to work Saturdays would have required TWA to pay premium wages.

Id. at 68–69, 14 Fair Empl. Prac. Cas. (BNA) at 1699.

[25] *See id.* at 69, 14 Fair Empl. Prac. Cas. (BNA) at 1699.

[26] *See id.* at 78–79, 84, 14 Fair Empl. Prac. Cas. (BNA) at 1703, 1705.

[27] *See id.* at 80–81, 14 Fair Empl. Prac. Cas. (BNA) at 1704.

[28] *TWA*, 432 U.S. at 81, 14 Fair Empl. Prac. Cas. (BNA) at 1704.

[29] *Id.* ("It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others . . . .").

[30] *Id.* at 78, 14 Fair Empl. Prac. Cas. (BNA) at 1703.

[31] *Id.* at 79, 14 Fair Empl. Prac. Cas. (BNA) at 1703 ("Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy . . . .").

the plaintiff, TWA would have to cover his shift with other available employees at premium wage.[32] The Court reasoned that this accommodation surpassed the threshold requirement of *de minimis* cost and was therefore an "undue hardship."[33]

Following *TWA*, the Eighth Circuit has consistently applied the *TWA* Court's interpretation of section 701(j).[34] For example, in 1979, in *Wren v. T.I.M.E.—D.C., Inc.*, the United States Court of Appeals for the Eighth Circuit held that an employer need not take steps to accommodate an employee's religious needs if doing so would deprive other employees of their contractual rights.[35] *Wren* involved a member of the Worldwide Church of God who sought relief from driving his truck on Saturdays.[36] The *Wren* court, holding for the employer, concluded that arranging for the plaintiff to have Saturdays off would violate the seniority system of the collective bargaining agreement.[37] Furthermore, the court found that replacing the plaintiff on Saturdays would require the employer to bear more than the threshold *de minimis* cost.[38] These costs included finding replacement drivers and making contributions to insurance and pension funds, as required when utilizing such replacement drivers.[39] Consequently, the court held that the employer had not violated Title VII in discharging the plaintiff.[40]

During the *Survey* year, in *Cook v. Chrysler Corp.*, the United States Court of Appeals for the Eighth Circuit held that an employer's obligation to "reasonably accommodate" an employee's religious beliefs does not require that the employer compromise other employees' contractual rights as secured by a collective bargaining agreement, or engage in preferential treatment based solely on an employee's religious beliefs if the financial cost of such treatment is more than *de*

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[32] *Id.* at 84, 14 Fair Empl. Prac. Cas. (BNA) at 1705.

[33] *See TWA*, 432 U.S. at 84, 14 Fair Empl. Prac. Cas. (BNA) at 1705.

[34] *See, e.g.*, Johnson v. Angelica Uniform Group, 762 F.2d 671, 674, 37 Fair Empl. Prac. Cas. (BNA) 1409, 1411 (8th Cir. 1985) (no violation of Title VII because collective bargaining agreement in effect provided reasonable accommodation of plaintiff's religious needs); Brown v. General Motors Corp., 601 F.2d 956, 958–59, 20 Fair Empl. Prac. Cas. (BNA) 94, 95–96 (8th Cir. 1979) (Title VII violated where accommodation would neither contravene collective bargaining agreement nor result in more than *de minimis* cost to employer); Wren v. T.I.M.E.—D.C., Inc., 595 F.2d 441, 445, 19 Fair Empl. Prac. Cas. (BNA) 584, 587 (8th Cir. 1979) (no Title VII violation where accommodation would deprive other employees of their contractual rights and would require employer to bear a more than *de minimis* cost).

[35] 595 F.2d at 445, 19 Fair Empl. Prac. Cas. (BNA) at 587.

[36] *See id.* at 443, 19 Fair Empl. Prac. Cas. (BNA) at 585.

[37] *Id.* at 445, 19 Fair Empl. Prac. Cas. (BNA) at 587.

[38] *Id.*

[39] *Id.* at 443, 19 Fair Empl. Prac. Cas. (BNA) at 585.

[40] *See Wren*, 595 F.2d at 445, 19 Fair Empl. Prac. Cas. (BNA) at 587.

minimis.[41] In *Cook*, the plaintiff, Jesse L. Cook, was an assembly line worker whose religious beliefs forbade him from working on the Sabbath.[42] The court reasoned that to accommodate Cook's requests for relief from his Friday night shift, Chrysler would have to contravene the seniority provision of the collective bargaining agreement and incur significant costs to its business.[43] Accordingly, the court held that Chrysler had not violated Title VII by discharging Cook.[44]

Cook began his employment in Assembly Plant 1, one of Chrysler's two automobile plants in St. Louis in January, 1976.[45] As a member of the Local 110 UAW ("Union"), Cook's employment was covered by a national collective bargaining agreement with Chrysler.[46] The national agreement set forth a two-shift production schedule; Shift 1 operated Monday through Saturday from 8:00 AM to 4:00 PM and Shift 2 operated Monday through Saturday from 4:00 PM to midnight.[47] Under this agreement, shift assignments at the St. Louis plants were determined by seniority and could not be changed by Chrysler without Union vote and approval.[48] The agreement also provided a no-fault absenteeism policy, known as the Uniform Attendance Procedure, which provided a six-step system of progressive discipline to deal with excessive absenteeism.[49] In addition, to address the particular problem of Friday night absenteeism, the local agreement at Plant 2 was amended in 1985 to include a "book system" which allowed employees to sign up in a book for an excused day off on a first-come-first-serve basis.[50]

In October 1985, Cook became a member of the Seventh Day Adventist Church.[51] One of the tenets of the Church is that a member

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[41] *See* 981 F.2d 336, 338, 60 Fair Empl. Prac. Cas. (BNA) 647, 648 (8th Cir. 1992).

[42] *Id.* at 337, 60 Fair Empl. Prac. Cas. (BNA) at 647.

[43] *See id.* at 338, 339, 60 Fair Empl. Prac. Cas. (BNA) at 648, 649.

[44] *See id.* at 340, 60 Fair Empl. Prac. Cas. (BNA) at 649.

[45] *Id.* at 337, 60 Fair Empl. Prac. Cas. (BNA) at 648.

[46] *Cook v. Chrysler Corp.*, 779 F. Supp. 1016, 1018, 57 Fair Empl. Prac. Cas. (BNA) 1180, 1182 (E.D. Mo. 1991).

[47] *Id.*

[48] *See id.* at 1018–19, 57 Fair Empl. Prac. Cas. (BNA) at 1182.

[49] *Id.* Under the procedure, no discipline is mandated for the first six absences in any six month period (excused or unexcused) but additional unexcused absences result in progressive discipline in six successive steps. *Id.* at 1018, 57 Fair Empl. Prac. Cas. (BNA) at 1182. For the first unexcused absence, the worker is counseled by Chrysler and the Union. *Id.* at 1018–19, 57 Fair Empl. Prac. Cas. (BNA) at 1182. The second step is additional counseling, the third is a five day lay-off, the fourth is a fifteen day lay-off, the fifth is a thirty day lay-off, and the sixth step results in permanent discharge from employment. *Id.* at 1019, 57 Fair Empl. Prac. Cas. (BNA) at 1182.

[50] *Id.* at 1019, 57 Fair Empl. Prac. Cas. (BNA) at 1182. Friday nights were the most sought after night for excused absences. *Id.*

[51] *Id.* at 1020, 57 Fair Empl. Prac. Cas. (BNA) at 1183.

may not perform manual labor from sundown Friday to sundown Saturday.[52] While working at Plant 1, Cook was assessed Step 1 discipline under the Uniform Attendance Procedure due to unexcused absences on Friday nights.[53] In January 1986, however, Cook was laid-off from Plant 1 and then transferred to Plant 2 before any additional disciplinary measures were taken for these unexcused Friday night absences at Plant 1.[54]

Soon after his transfer to Plant 2, Cook informed his supervisor of his religious beliefs and his inability to work on Friday nights.[55] Cook proposed a shift change, working on a Sunday instead of Friday, or alternatively, a flexible schedule.[56] His supervisor contacted the Union shop steward and the labor relations supervisor in an effort to accommodate Cook.[57] While waiting for a response from his supervisor, Cook continued to accrue unexcused absences on Friday nights.[58] He was progressively disciplined pursuant to the six-step procedure.[59] Shortly thereafter, Cook's supervisor informed him that Chrysler could not accommodate him by changing his shift.[60] Cook continued to miss work on Fridays and was eventually discharged.[61]

On September 24, 1986, Cook filed a religious discrimination claim with the EEOC against Chrysler.[62] The EEOC issued a Right to Sue letter, and Cook subsequently filed suit in the United States District Court for the Eastern District of Missouri under Title VII of the Civil Rights Act of 1964.[63] He alleged that he was discharged by Chrysler on the basis of his religion and sought reinstatement, back pay, seniority, lost benefits and legal fees.[64] The district court ruled in favor of Chrysler, holding that Chrysler's efforts to accommodate Cook satisfied the requirements of Title VII.[65]

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court's decision by applying a two-pronged

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[52] *Cook*, 779 F. Supp. at 1020, 57 Fair Empl. Prac. Cas. (BNA) at 1183.

[53] *Id.*

[54] *Id.*

[55] *Cook v. Chrysler Corp.*, 981 F.2d 336, 338, 60 Fair Empl. Prac. Cas. (BNA) 647, 648 (8th Cir. 1992).

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] See *supra* note 49 and accompanying text for a discussion of the six-step procedure.

[60] *Cook*, 981 F.2d at 338, 60 Fair Empl. Prac. Cas. (BNA) at 648.

[61] *Id.*

[62] *Cook*, 779 F. Supp. at 1022, 57 Fair Empl. Prac. Cas. (BNA) at 1184.

[63] *Id.*

[64] *Id.* at 1022, 57 Fair Empl. Prac. Cas. (BNA) at 1184–85.

[65] *Id.* at 1025, 57 Fair Empl. Prac. Cas. (BNA) at 1187–88.

test to determine whether Chrysler had violated Title VII's "reasonable accommodation" standard.[66] The test, which mirrored the Supreme Court's reasoning in *TWA* and the Eighth Circuit's previous line of cases, stated that differential treatment of co-employees resulting from the accommodation of an employee's religious needs runs afoul of Title VII if it: 1) compromises other employees' contractual rights as secured by a collective bargaining agreement; *or* 2) confers a privilege, the cost of which is more than *de minimis*, solely on the basis of the recipient's religious beliefs.[67]

Addressing the first prong of the test, the court held that accommodating Cook would indeed compromise other employees' contractual rights as secured by the collective bargaining agreement.[68] The court concluded that to grant Cook the shift change he desired, Chrysler would have had to contravene its seniority system.[69] The court stressed that shift preference under this system was highly prized by the employees and that accommodating Cook would deprive other employees of this privilege.[70] Furthermore, the court reasoned that the seniority system, which established a neutral method of minimizing the number of occasions when an employee would have to work on a day he would prefer to have off, itself provided a significant accommodation to the religious and secular needs of Chrysler's employees.[71]

Turning to the second prong, the court held that all possible accommodations that would not violate the collective bargaining agreement would result in more than a *de minimis* cost to Chrysler.[72] According to the court, to allow Cook excused absences every Friday would result in his becoming a part-time employee with full-time benefits.[73] Chrysler provided evidence demonstrating that the cost of a benefits package when an employee was absent once a week ex-

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[66] *Cook*, 981 F.2d at 338, 60 Fair Empl. Prac. Cas. (BNA) at 648. This two-pronged test was first introduced by the Eighth Circuit in Brown v. General Motors Corp., 601 F.2d 956, 962, 20 Fair Empl. Prac. Cas. (BNA) 94, 98 (8th Cir. 1979).

[67] *See Cook*, 981 F.2d at 338, 60 Fair Empl. Prac. Cas. (BNA) at 648; *TWA*, 432 U.S. at 84–85, 14 Fair Empl. Prac. Cas. (BNA) at 1705–06; *see also* Johnson v. Angelica Uniform Group, 762 F.2d 671, 674, 37 Fair Empl. Prac. Cas. (BNA) 1409, 1411 (8th Cir. 1985); Brown v. General Motors Corp., 601 F.2d at 962, 20 Fair Empl. Prac. Cas. (BNA) at 98; Wren v. T.I.M.E.—D.C., Inc., 595 F.2d 441, 445, 19 Fair Empl. Prac. Cas. (BNA) 584, 587 (8th Cir. 1979); Huston v. Local No. 93, Intern. U., United, Etc., 559 F.2d 477, 480, 16 Fair Empl. Prac. Cas. (BNA) 326, 328.

[68] *Cook*, 981 F.2d at 338, 60 Fair Empl. Prac. Cas. (BNA) at 648.

[69] *Id.* at 338, 60 Fair Empl. Prac. Cas. (BNA) at 649.

[70] *See id.* at 338–39, 60 Fair Empl. Prac. Cas. (BNA) at 649.

[71] *Id.* at 339, 60 Fair Empl. Prac. Cas. (BNA) at 649.

[72] *Id.*

[73] *Cook*, 981 F.2d at 339, 60 Fair Empl. Prac. Cas. (BNA) at 649.

ceeded $1,500 per year.[74] In addition, the court reasoned that replacing Cook every Friday night would require Chrysler to utilize a "floater"—a full-time employee who replaces other workers due to vacations, advanced excused absences, or medical emergencies.[75] Furthermore, if a floater was needed to replace Cook on a regular basis, another floater would have to be hired at full wages to keep an adequate number of floaters available for other absences.[76] Finally, the court concluded that Cook's absence would affect the quality of work because more repairs and lower efficiency result when a temporary worker is used on the line.[77]

After *Cook*, it is highly unlikely that an Eighth Circuit court will ever find that an employer has failed to accommodate an employee's religious beliefs. The *Cook* court's two-pronged test practically eviscerates the employer's burden of accommodating an employee's religious practices. In effect, the *Cook* court has circumscribed an employee's right to seek a meaningful accommodation of his or her religious beliefs.[78] If an employee's work schedule is governed by any contract or policy which is neutral on its face, the employer's duty to accommodate is satisfied.[79] Even if no contract exists, or an accommodation is suggested by the employer that does not contravene such a contract, the employer need only show that the hardship caused by such an accommodation passes the very low threshold of *de minimis* cost.[80]

The *Cook* court's two-pronged test, which puts great emphasis on the concept of unequal treatment of co-employees, also seems inconsistent with the purpose behind section 701(j). Although it has been well documented that the legislative history of the amendment is of no assistance in setting guidelines for the standards of "reasonable accommodation" and "undue hardship," the purpose of the amendment can be clearly discerned.[81] Senator Randolph, the sponsor of section 701(j), made it clear that the statute's purpose was to protect Sabbath observers from employers who discharge employees whose

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[74] *Id.*

[75] *See Cook*, 779 F. Supp. at 1021, 57 Fair Empl. Prac. Cas. (BNA) at 1184.

[76] *Cook*, 981 F.2d at 339, 60 Fair Empl. Prac. Cas. (BNA) at 649.

[77] *Id.*

[78] *See* Laurel A. Bedig, Comment, *The Supreme Court Narrows an Employer's Duty to Accommodate an Employee's Religious Practices Under Title VII*, 53 BROOK. L. REV. 245, 268 (1987).

[79] *See Cook*, 981 F.2d at 338–39, 60 Fair Empl. Prac. Cas. (BNA) at 648–49.

[80] *See id.* at 338, 60 Fair Empl. Prac. Cas. (BNA) at 648.

[81] *See* 118 CONG. REC. 705 (1972). *See Trans World Airlines v. Hardison*, 432 U.S. 63, 74–75, 14 Fair Empl. Prac. Cas. (BNA) 1697, 1701–02 (1977); LARSON & LARSON, *supra* note 12, at § 92.11; Silbiger, *supra* note 16, at 841–42.

religious practices require them to abstain from work on particular days.[82]

To truly conform with the meaning and purpose of section 701(j), employers should be obligated to consider all possible accommodations, even if the employee's work schedule is governed by a neutral contract. Only if all possible accommodations are shown to result in an "undue hardship" should the employer be relieved of its Title VII obligation. Focusing on the unequal treatment of co-employees contradicts the original purpose behind section 701(j).

Furthermore, the *de minimis* cost test for "undue hardship" is far too low a threshold for section 701(j) to have any true meaning. "Undue hardship" arguably comprehends more hardship than simply that which is necessary to bring about accommodation at all.[83] Under the *de minimis* test, however, hardship is more likened to inconvenience. To truly reach the purpose of the statute of protecting employees' religious liberty, employers must be obligated to make more than mere *de minimis* economic sacrifices to insure that their employees are being accommodated.

Currently, however, employers in the Eighth Circuit know that all they need to do is offer the bare minimum in terms of accommodation to their employees.[84] Courts interpreting section 701(j) should seek a compromise between the employee's religious needs and the employer's economic needs. Courts should not analyze accommodation cases utilizing a rigid two-pronged test, but rather should adopt a more sensitive inquiry into the facts of each case. This inquiry should value the employee's moral commitment to his or her religious beliefs equally with the employer's economic interests. This approach would more likely reach Senator Randolph's original purpose in enacting section 701(j) of protecting employees with special religious needs. Unfortunately, the Eighth Circuit does not seem interested in approaching its accommodation cases with this heightened level of sensitivity.

In sum, the Eighth Circuit has interpreted section 701(j) to protect the employers and their economic interests, not the employees and their religious beliefs. The *Cook* court, by resorting to a rigid, standardized two-pronged test, has struck another harsh blow to the "reasonable accommodation" duty, which was already wounded by the

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[82] 118 CONG. REC. 705 (1972). *See TWA*, 432 U.S. at 89, 14 Fair Empl. Prac. Cas. (BNA) at 1708 (Marshall, J., dissenting).

[83] *See* Silbiger, *supra* note 16, at 841.

[84] *See* Bedig, *supra* note 78, at 268.

Eighth Circuit's treatment of section 701(j) in previous cases. If an employee's work schedule is governed by any neutral policy, or if the cost of accommodating the employee outside of that policy is more than *de minimis*, the employer has satisfied its obligation under section 701(j). Barring Supreme Court intervention, it is doubtful that in the future an employee will recover under section 701(j) in the Eighth Circuit.